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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1076

PHOENIX FINANCE CORPORATION, A DELAWARE CORPORATION,

Petitioner,

vs.

IOWA-WISCONSIN BRIDGE COMPANY, A DELAWARE CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA AND BRIEF IN SUPPORT THEREOF.

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vs.

IOWA-WISCONSIN BRIDGE COMPANY, A DELAWARE CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Phoenix Finance Corporation, respectfully asks that a writ of certiorari be issued directed to the Supreme Court of Iowa for the review of the judgment of that court which was made finally effective by denial of a petition for rehearing on January 11, 1946. The judgment of the Supreme Court of Iowa affirmed (as to the cause of action here under consideration) a judgment of the District Court for Allamakee County, Iowa, dismissing a petition for mortgage foreclosure under a defense of *res adjudicata.*

A certified transcript of the record in the case below has been filed.[1]

I

Summary Statement of Matter Involved[2]

Phoenix[2a] holds a $50,000 note secured by mortgage on Bridge Company property in Iowa. This mortgage was also, by its terms, security for further advances which had been made for Bridge Company's account. After the mortgage and note were given and the subsequent advances made, the mortgage debts were surrendered by Phoenix for Bridge Company bonds, part of a $200,000 issue, which were secured by a mortgage trust indenture on Bridge Company property. The named trustees in the indenture were a bank (an Iowa corporation) and an individual (a Wisconsin resident). The surrender by Phoenix of the $50,000 mortgage was coupled with an agreement with Bridge Company that if the validity of the bonds accepted in exchange therefor, were attacked, the $50,000 mortgage and the debts it secured should be reinstated as valid and subsisting obligations.

The validity of the entire $200,000 bond issue was subsequently attacked both by the Bridge Company and by an intervening stockholder in a foreclosure action in the federal district court in Iowa, instituted by the trustee-

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[1] The Record in this cause is complex and (through no fault of petitioners) unnecessarily prolix. For the assistance of the Court the following explanation is supplied: Pages 1 to 261, cited with the prefix "R," comprise the printed record in the Iowa Supreme Court from the court below. Duplicate pagination occurs because of the inclusion, as an exhibit, of 6 volumes of the printed record in the federal foreclosure cause, herein extensively cited. Pages 1 to 1718, cited with the prefix "F. R.," are references to that exhibit. Page references subsequent to p. 1718 and comprising other exhibits and the proceedings in the Iowa Supreme Court, are herein also cited with the prefix "R."

[2] See "Statement of this Case," *post*, p. 10 for complete record references.

[2a] For convenience and brevity petitioner will be herein designated as "Phoenix" and respondent as "Bridge Company."

mortgagees under the indenture securing the $200,000 bond issue. That action was in the federal court by reason of diversity (Iowa corporation and Wisconsin resident against Bridge Company, a Delaware corporation).

The decree in the federal foreclosure cause denied foreclosure and held that all except a very few bonds were invalidly issued. Those invalidated included the bonds accepted by Phoenix upon surrender of the $50,000 mortgage and debt.

After the bill in the federal foreclosure cause was filed and the Bridge Company had answered, Phoenix (a Delaware Corporation) was involuntarily brought into the case by order on motion of an intervener, who prayed for the cancellation of Phoenix' bonds. The order purported to make Phoenix a party *plaintiff* in the principal cause and a party *defendant* to the intervention petition (a cross-complaint) for cancellation.

Phoenix took no part as a litigating party in the trial of the federal foreclosure cause, and the issue of cancellation of bonds was not pressed or decided. On motion for rehearing raising the jurisdictional question, the court held that Phoenix was only a "nominal or formal" party; that the trustee-plaintiffs were the only indispensable parties; and that federal jurisdiction had not been ousted by the injection of Phoenix as a party. Affirmed, C. C. A. 8th; certiorari denied, Supreme Court U. S.

In the case below Phoenix sued in the Iowa State Court on the reinstated $50,000 mortgage. The defense was *res adjudicata* bottomed upon the federal foreclosure decree denying foreclosure of the trust indenture. The Iowa district court sustained the plea, the Supreme Court of Iowa affirmed and denied rehearing, whereupon this petition for certiorari is presented.

The question, thus decided adversely to Phoenix and which this court is asked to review is—does the decree in

the federal foreclosure operate as an adjudication against Phoenix

(a) where Phoenix was not an actual party thereto to support a decree *in personam;*

(b) where Phoenix, as an adversary party to Bridge Company in respect of any issue in the cause, would have destroyed federal jurisdiction based upon diversity; and

(c) where the Trustee-Mortgagees had no authority in fact to represent Phoenix, a bondholder, with respect to any of the issues raised in the subsequent proceeding?

II

Statement of Supreme Court's Jurisdiction to Review Decree of the Supreme Court of Iowa

Jurisdiction is invoked under Section 237(b) of the Federal Judicial Code as amended (28 U. S. C. Sec. 344(b)). Although judicial proceedings of a Federal Court are not within the express coverage of the full faith and credit clause, they "must be accorded the same full faith and credit by state courts as would be required in respect of the judicial proceedings of another State." *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 33; *Hancock Natl. Bank* v. *Farnum,* 176 U. S. 640, 644; *Embry* v. *Palmer,* 107 U. S. 3, 9.

Where in a State court a right of immunity is set up by virtue of a judgment or decree of a federal court the case is "one in which a title or right is claimed under an authority exercised under the United States" within the meaning of Section 237(b). *Knights of Pythias* v. *Meyers, supra; Cumberland Glass Mfg. Co.* v. *DeWitt,* 237 U. S. 447, 449; *Pittsburgh C. C. & St. L. Ry. Co.* v. *Long Island Loan & Trust Co.* 172 U. S. 493, 507.

Moreover this court has jurisdiction of the question here presented because of a "right, privilege or immunity" claimed by petitioner "under the Constitution," viz., the due process clause of the 14th Amendment. Where a judgment or decree lacks the qualities to entitle it to full faith and credit "judicial action enforcing it * * * is not that due process which the Fifth and Fourteenth Amendments require." *Hansberry* v. *Lee,* 311 U. S. 32; *Postal Tel. Cable Co.* v. *Newport,* 247 U. S. 464; *Old Wayne Mut. Life Asso.* v. *McDonough,* 204 U. S. 8.

III

The Questions Presented

In the broad aspect of the problem here presented, it may be said that the narrow question is: Shall the United States Supreme Court give recognition to the limitations on the principle of trustee representation stated in *Mackay* v. *Randolph Macon Coal Company* (8th Cir.), 178 F. 881? More specifically—(1) Does the trustee of an indenture securing a bond issue, represent a bondholder to litigate the validity of considerations for debts secured by a prior mortgage which had been exchanged for bonds (absent express or clearly implied authority in the trust indenture) where the status of such bondholder as a party to a foreclosure action brought by the trustee would have destroyed federal jurisdiction based upon diversity?

(2) Is an adjudication adverse to such a trustee on the obligor's promise, *to the trustee,* to pay the bonds, as contained in the trust indenture, *res adjudicata* with respect to the obligor's express and implied promises, *to its creditor* (a subsequent bondholder), to repay loans and advances which had become merged in later issued bonds under an agreement that the prior indebtedness should be reinstated, if the validity of the bonds were attacked?

(3) In such case, is the obligor's promise to the trustee in the trust indenture and the cause of action thereon, separate and distinct (a) from the obligor's promises to bondholders, as evidenced by the bonds, and the causes of action thereon, and (b) from the even more remote promises to a creditor, who later became a bondholder, to repay certain loans and advances, and the causes of action thereon?

(4) Where, in a foreclosure action brought in the federal court by such trustee-mortgagees, the bondholder (the earlier contract creditor) is brought in as a party to a cross-complaint for cancellation of bonds, as to which issue no federal jurisdiction existed, and which separate issue was not the subject of judgment or decree, was the impleaded bondholder such a party to the issue of mortgage foreclosure as will support a decree *in personam* against it on the underlying debts?

(5) Where such bondholder later sued on the reinstated contract debts in a state court, may the decree denying foreclosure because of invalidity of bonds, be asserted as *res adjudicata* of the causes of action based upon such debts?

(6) Where such defense of *res adjudicata* is sustained by a state court, has such litigating party been denied due process with respect to its right to assert its choses in action?

IV

Reasons Relied upon for Allowance of Writ

There is here involved a substantial federal question of due process under the 14th Amendment by reason of the according of supposed full faith and credit to a decree of a federal court to support a plea of *res adjudicata* in a subsequent state court proceeding in which a plaintiff (a)

who had not been either an actual or represented party in the prior federal cause (b) sues upon different causes of action.

It is submitted that in the exercise of the judicial discretion reposed in the Supreme Court to grant the writ here prayed there are the following impelling reasons related to the above essential question:

1. The Supreme Court of Iowa has decided the questions presented in direct conflict with a controlling decision of the United States Circuit Court of Appeals for the Eighth Circuit in *Mackay* v. *Randolph Macon Coal Co.*, 178 Fed. 881. Robertson and Kirkham's Jurisdiction in the Supreme Court of the United States, Sec. 298, p. 597, Sec. 341, page 697.

2. The Supreme Court of Iowa has decided federal questions of substance not heretofore directly determined by the United States Supreme Court, Rule 38, 5(a).

3. The Supreme Court of Iowa decided federal questions of substance in a way not in accord with the reasoning contained in and analogies to be drawn from the applicable decisions of the United States Supreme Court on trustee representation generally. Rule 38, 5(a).

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued to the Supreme Court of Iowa.

PHOENIX FINANCE CORPORATION,
By JAMES R. MORFORD,
Its Attorney.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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PHOENIX FINANCE CORPORATION, A DELAWARE CORPORATION,

Petitioner,

vs.

IOWA-WISCONSIN BRIDGE COMPANY, A DELAWARE CORPORATION,

Respondent

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinions Below

The findings of fact, conclusions of law and decree of the District Court of Allamakee County, Iowa, appear at R. 231-252. The opinion of the Supreme Court of Iowa is to be found at R. 1923-1937 and in 20 N. W. (2d) 457. Opinions in the federal foreclosure cause are as follows: District Court, F. R. 156-179 and 19 F. Supp. 127; affirmed 8 Cir., F. R. 1689-1709 and 98 F. (2d) 416; certiorari denied, 305 U. S. 650, 676. In a later proceeding, supplemental and ancillary to the federal foreclosure cause, an opinion of the federal District Court appears in 32 F. Supp. 277; affirmed 8 Cir., 115 F. (2d) 1; certiorari granted, 312 U. S. 670; reversed, 314 U. S. 118; rehearing denied, 314 U. S. 585.

Jurisdiction

The jurisdiction of this court to grant the writ prayed is fully set forth under Heading II of the Petition (pp. 4, 5).

Statement of the Case[3]

(a) *The Cause of Action Below*

Phoenix instituted an equity cause for mortgage foreclosure in Iowa District Court for Allamakee County upon a mortgage which was security for Bridge Company's past due promissory note dated March 10, 1931 in the sum of $50,000, plus interest, and certain matured claims for money paid, laid out and expended for the use of Bridge Company. The $50,000 mortgage sued upon was an "open mortgage"[4] securing prospective advances to be made by Phoenix for the Bridge Company's account, in addition to the principal obligation represented by the $50,000 note[5] (R. 2-18).

Bridge Company defended, by plea of *res adjudicata*, that Phoenix' cause of action had been adjudicated in a certain prior cause in the U. S. District Court for the Northern District of Iowa entitled "First Trust & Savings Bank (formerly Bechtel Trust Company) and A. H. Schubert, trustees, v. Iowa-Wisconsin Bridge Company"[6] in which the same defendant had prevailed and the foreclosure of a trust indenture securing a $200,000 bond issue had been denied (R. 18-32).

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[3] See also "Summary Statement," *ante*, p. 2.

[4] The mortgage provided that "at any time during the existence of this indebtedness • • • [Phoenix] • • • is authorized • • • to pay all liens of any kind, whether prior or subsequent • • • and for the repayment of all moneys so paid, together with interest • • • this indenture shall be like security in like manner, and with like effect as for the payment of said note (R. 3).

[5] Among such items was $9000 paid by Phoenix to a contractor (R. 3, 4) to satisfy a lien on Bridge Company property. The particular pertinency of this item is discussed under Point V of the Argument (p. 36).

[6] 19 F. Supp. 127, F. R. 156-179; 98 F. (2d) 416, F. R. 1689-1709.

Phoenix replied admitting the prior decree but contending, *inter alia,* (1) that the federal court did not have jurisdiction of it because it had been neither an actual or a represented party to the federal foreclosure cause in respect of the debts in suit in the state court, (2) that if it had been a party to the federal foreclosure cause, the federal court would have been deprived of its statutory jurisdiction,[7] (3) that the issues were different, and (4) that, although the $50,000 note and mortgage sued upon in the state court had been exchanged for Bridge Company bonds secured by the trust indenture involved in the federal court action, and although the federal district court had held the trust indenture and bonds invalid, the Bridge Company had formally agreed (R. 43-48) that in the event the validity of the bonds thus exchanged for the $50,000 mortgage and note should be attacked, the plaintiff below should have the right to surrender its bonds and reinstate its $50,000 mortgage and note, which right it had exercised and upon which reinstated mortgage obligation it was then suing (R. 39-64).

The Iowa District Court sustained the plea of *res adjudicata* and dismissed the proceeding (R. 250-251). As to this aspect of the case below [8] the Supreme Court of Iowa affirmed (R. 1823-1937, 20 N. W. (2d) 457) and denied petition for rehearing on January 11, 1946 (R. 1953, 1957).

(b) *The Prior Federal Foreclosure Cause*

Bridge Company's plea of *res adjudicata* had as its foundation the following proceedings in a federal District Court:

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[7] Both Phoenix and the Bridge Company are Delaware corporations.

[8] This petition deals only with one of two causes of action asserted below. As to the second, Phoenix's right to recapture 517 shares of Bridge Company stock, which it had also exchanged for bonds, the district court denied recovery but the Supreme Court of Iowa reversed. Actually the opinion of the Supreme Court of Iowa lacks consistency because petitioner's right to assert the $50,000 mortgage debts has the same legal status as was held with respect to the shares.

A bill for foreclosure of a mortgage trust indenture was filed August 28, 1933 in the U. S. District Court for the Northern District of Iowa by the trustees named in the indenture (an Iowa Corporation and an individual resident of Wisconsin) against the Bridge Company, a Delaware corporation (F. R. 1). It was alleged therein (F. R. 2) "that this controversy is wholly between citizens of different states and the jurisdiction of this Court is based upon diversity of citizenship." The prayers of the Bill included (F. R. 10): (1) that an account be taken of the *res* and the mortgage be declared a lien thereon; (2) that an account be taken of bonds and interest and that defendant be decreed to pay complainants the amount found to be due plus costs and expenses; and (3) that, in default thereof, the mortgaged property be sold. The Bridge Company appeared and by its answer (F. R. 66) did little more than put the plaintiffs to their proof.

Then one Kendrick, applying as a proposed intervener in the right of Bridge Company, filed a motion praying (F. R. 83-84) that Phoenix Finance System, Inc., and other corporations, but not including Phoenix Finance Corporation (a distinct entity), "be made parties defendant herein and that process issue and be served for that purpose *on the ground that they are necessary and proper parties to this cause* * * *."[9] This motion was granted by order (F. R. 85-86) that "the Phoenix Finance System, Inc., and the Phoenix Finance Corporation *be made parties plaintiff in this cause, and the defendants to the petition of intervention* * * *." In a supplement opinion after final decree the District Judge said with respect to this order (F. R. 208): "*Whether the citizenship of Phoenix*

[9] Unless otherwise indicated, italics, appearing in quotations, are supplied.

Finance Corporation was at the time given any thought does not appear."

The intervention petition of Kendrick, a resident of Minnesota and a stockholder of the Bridge Company, prayed (F. R. 82, 83) that the bill be dismissed, that the mortgage deed of trust be set aside, and *inter alia* "that Phoenix Finance System, Inc.[10] and the aforesaid Phoenix Finance Companies [not including petitioner], and the Thompson Company of Iowa and the John A. Thompson Company of Toledo, *be ordered and directed to deliver to the office of the Clerk of this Honorable Court the aforesaid bonds for cancellation and that the same be cancelled* * * *." Thereupon Bridge Company amended its answer by also adding a prayer for cancellation of bonds (F. R. 68).

Although no pleading named it as a party to any issue (even for cancellation of bonds) an alias subpoena was issued directed to petitioner requiring it (F. R. 88) to "appear * * * *to answer to the bill of complaint of Bechtel Trust Company and A. H. Schubert, as Trustees;* * * * *and to* [*sic*] *petition of intervention of Fayette D. Kendrick, Intervener,* * * *." Phoenix and the other added parties were then notified by the terms of the subpoena, that, in the event of default (F. R. 88) "*the bill may be taken pro confesso against them and a decree entered thereon as prayed in said bill.*"

Phoenix being thus compelled (F. R. 88), caused its appearance to be entered by counsel (F. R. 89) "as plaintiff under order of Court and defendant to Petition of Inter-

[10] A substantial point may be made that petitioner, *Phoenix Finance Corporation*, as distinguished from another corporate entity known as *Phoenix Finance System, Inc.*, is not named in any pleading. No issue is stated (even for cancellation) to which it is a named party, and no relief is prayed against it. *Reynolds* v. *Stockton*, 140 U. S. 254; *Southern Pacific R. Co.* v. *U. S.*, 168 U. S. 1; *Baltimore Steamship Co.* v. *Phillips*, 274 U. S. 316.

vention of Fayette D. Kendrick," and answered (F. R. 91, 92) putting in issue only the allegations against its alleged predecessor, Phoenix Finance System, Inc., contained in the intervention petition. The intervener in certain resistances filed in the foreclosure cause referred to his petition as a "Cross-Bill" and Phoenix' answer as an "answer to cross-bill" (F. R. 207, 393). Petitioner accepts this as a precise characterization of those pleadings.

Phoenix offered no evidence on its own behalf at hearings before a master, although certain of its officers were examined both by the trustee plaintiffs and by the intervener. The cross-complaint for cancellation was apparently never tried. The master recommended that the bill be dismissed as to $172,875 of bonds but that the prayer for foreclosure should be granted as to bonds in the amount of $27,125 (F. R. 137, 138). On December 1, 1936, upon review of the master's report, the decree forming the basis of the plea of *res adjudicata* was entered, affirming the master in part and reversing in part. The decree (F. R. 203, 204) was responsive only to the issue of mortgage foreclosure and did not purport to cancel bonds. *It merely denied foreclosure.*

By petition for rehearing Phoenix challenged the jurisdiction of the federal district court but that court held that the addition of Phoenix as a party did not oust federal jurisdiction, it being merely a "nominal or formal" party (F. R. 208-211, 19 F. Supp. at p. 141). On this point the 8th Circuit affirmed (F. R. 1691-1692, 98 F. (2d) 419, 420).[11] *Accepting this postulate, petitioner's position is that it was not a party against whom the federal decree should operate*

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[11] "It is settled that the jurisdiction of the federal court cannot be defeated by the joinder of an unnecessary party [citing cases]; and the bringing in of an unnecesary party after the commencement of the suit will not oust the jurisdiction. [citing cases] • • • Looking to the language of the trust deed alone it is apparent that the trustees are the only necessary and indispensable parties plaintiff."

as an adjudication, except to the extent that it was in the case by representation of the plaintiff-trustees.

(c) *The Limitations on the Plaintiff-Trustees' Authority to Represent Bondholders as Evidenced by the Indenture*

We are not here concerned with the question whether Phoenix was properly made a party defendant to the cross-complaint for cancellation because cancellation was not decreed. Therefore the only factual question remaining is: Did the indenture confer upon the trustees authority to represent bondholders as their agents for the collection (a) of the debts evidenced by bonds, and (b) of contract debts which became reinstated as subsisting obligations after bonds for which they had been exchanged became invalidated?

Article V, Sec. 3(c) of the indenture (F. R. 37, 38) [12] confers upon the trustees the power to "proceed to protect and enforce their rights and the rights of bondholders *under this Indenture*" and certain rights, including the rights of foreclosure and specific performance, are enumerated. Article V, Sec. 13 (F. R. 43, 44) denies to bondholders right to foreclose or to execute any trust contained in the indenture, it being "understood and intended that no one or more holders of bonds and coupons shall have any right in any manner whatever by his or their action to affect, disturb or prejudice the lien of this Indenture or to enforce any right hereunder, except in the manner herein provided * * *."

Thus the grant of the sole power to the trustee to foreclose is absolute, but at the same time, the right of action for the debt evidenced by the bonds is expressly reserved

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[12] A comparison between the provisions of the indenture here recited and corresponding provisions in *Mackay* v. *Randolph Macon Coal Co.*, *infra*, is invited. See footnote 23 post, p. 31.

to bondholders and withheld from the trustees by the following (Article V, Sec. 13, F. R. 44):

> "Nothing in this Section or elsewhere in this Indenture or in said bonds or in the coupons attached thereto shall affect or impair the obligation of the company which is unconditional and absolute to pay the principal and interest of said bonds to the respective holders thereof and of the coupons attached thereto at the respective due dates therein stated, *nor affect or impair the right of action which is absolute and unconditional of such holders to enforce such payment.*"

It was concededly possible for the mantle of authority to have been cast upon the shoulders of the trustees to sue, as the agent of all bondholders, for the entire bond debt *qua* debt. But the applicable clauses of the indenture were never called into operation,[13] as is demonstrated by an appended footnote.[14] Accordingly, the trustees lacked the

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[13] The provisions of trust deeds whereby the owners of the debt (the bondholders) purport to confer upon a stranger to the debt (the trustees) the naked right to sue therefor, as the agents of the debt owners, are subject to a rule of strict construction. See *post* pp. 28-29.

[14] The first maturities of the $200,000 bond issue were on Jan. 1 and Feb. 1, 1933 when $10,000 of bonds became due. Article V, Sec. 2 (F. R. 35) of the indenture required the trustees, in the event of default which "shall continue for a period of sixty days after written notice" from the trustees to the Bridge Company, and upon a request in writing from the holders of 25% or more of outstanding bonds, "by notice in writing * * * [to] declare the company in default * * * and/or declare the principal of all bonds * * * to be due and payable immediately. * * *"

On July 12, 1933 the trustees received a request from Phoenix (a holder of more than 25% of the issue) to declare a default (F. R. 789-791) and to initiate proceedings "to foreclose said Deed of Trust" (F. R. 790). Thereupon, the trustees, on July 13, 1933 sent a written notice to Bridge Company, whereby (F. R. 791-793), after calling attention to the above noted default as to principal of $10,000 of bonds, the non-payment of the July 1st interest on Series A bonds, and the non-payment of 1932 general property taxes, the trustees stated (F. R. 792): "You are hereby notified that the failure on the part of the Company to comply with the requirements of the Mortgage Deed of Trust with respect to the payment of interest and with respect to the payment of taxes, as above noted, within

authority to seek the relief prayed in the second prayer of the bill for foreclosure (F. R. 10) [15] *as the basis of a decree in personam against any bondholder,* in contradistinction to their right to execute the trust by an equitable foreclosure of the *res.*

However, the case below does not involve any purported attempt by Phoenix to relitigate any debt evidenced by any bond now or formerly held by it. Even if Phoenix, as a

[15] "That an account may be taken of the bonds and interest coupons secured by said Mortgage Deed of Trust and of the amount due on the said bonds for principal and interest, or otherwise, and of the amounts expended or to be expended by your Complainants; and that said Iowa-Wisconsin Bridge Company may be decreed to pay to your complainants the amount found to be due on such accounting together with costs and expenditures in this proceeding and the attorney fees by the court assessed, within a short day to be fixed by the court * * *."

Sixty (60) days from the date hereof, *may require the undersigned Trustees to declare the principal of all bonds issued and outstanding under said Deed of Trust to be due and payable immediately in addition to and irrespective of the default with respect to the payment of principal on certain of the Bonds hereinbefore set forth.* Unless [you] shall, * * * *within the time provided,* comply with the provisions of the said Deed of Trust with respect to the defaults or any of them herein noted, *the undersigned Trustees will be compelled to initiate proceedings for the foreclosure of said Deed of Trust* and take whatever other action may be necessary or required in the premises."

No further declaration or demand was made and the bill for foreclosure was filed August 28, 1933 (F. R. 1), 46 days thereafter, referring (F. R. 8, 9) to the notice of July 13, 1933 as a declaration designed to mature the whole bond issue.

By Art. V, Sec. 10 (F. R. 41) the Bridge Company promised the trustees, in the event of default in the payment of bond interest continuing for 60 days, or of default in the payment of principal of bonds "whether by regular maturity * * * or by declaration as authorized by this Indenture," that it would "then, *upon demand of the Trustees* * * * pay to the Trustees, for the benefit of the holders of the bonds * * * all such bonds and coupons then outstanding," and, if it should fail to pay principal and interest *"forthwith upon such demand,* the Trustees in their own name, and as trustees of an express trust" were authorized "to recover judgment for the whole amount so due and unpaid."

The July 13th notice from the trustees to the Bridge Company was obviously not a self-executing declaration. The trustees did not declare

bondholder, had, with other bondholders, delegated to the trustees the power to sue for the debts evidenced by bonds (in contradistinction to the debt-covenants of the trust indenture such is not this case. Phoenix did not sue below upon any bond. It sued upon a prior $50,000 mortgage securing a $50,000 note and certain further advances, including particularly a $9,000 item. That mortgage and those debts had been exchanged for bonds, under an agreement that the same would at the option of Phoenix, be rein-

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future maturities then and there payable but merely stated that, if the defaults continued for 60 days thereafter, they "may" be required to declare the principal of later maturing bonds due and payable and that "unless" the Bridge Company should correct the defaults "within the time provided" they would "be compelled to initiate proceedings" for foreclosure. Even if we were to construe the July 13th notice as a "demand" for payment of the matured $10,000 of bonds, it was not such a "demand" with respect to the unmatured $190,000, because it gave the Bridge Company 60 days to cure defaults, after which period the trustees "may" (but did not) declare an acceleration of future maturities. No agency in the trustees may be bottomed on Article V, Sec. 10.

In view of the language of the notice of July 13th it is doubtful whether the trustees really had power to start foreclosure proceedings until 60 days after the date of the notice, because they could not have foreclosed on a mortgage indenture securing a $200,000 bond issue, unless, in conformity with the indenture, future bond maturities were first accelerated by a self-executing declaration. Be that as it may, the trustees had no authority to *represent* bondholders to sue for the whole bonded debt, until there had been a *demand* for the payment of the entire debt, and there was no right to make such a *demand*, until after (or at least contemporaneously with) a *declaration of default* having the effect of making bonds, with later maturity dates, due and payable immediately. *No such declaration and demand appears in the record of the federal foreclosure cause.*

The Supreme Court of Iowa simply indulged in loose language when it remarked (R. 1931) (20 N. W. (2d) at p. 461) that Phoenix "initiated the litigation in federal court in an effort to collect the obligations it seeks here to collect." Phoenix had not sued or authorized the trustees to sue the Bridge Company *on its bonds*, much less on the then moribund $50,000 mortgage obligations. *It had merely called upon the trustees to execute the trust* and, by their letter of July 13th in pursuance of this request, the trustees put the Bridge Company on notice that if it did not make good its defaults within 60 days *they might be required to start foreclosure proceedings.*

stated if an attack were made upon the validity of the bonds received in exchange. The invalidity of the bonds was not determined until the decree in the federal foreclosure cause was entered. At some time after the case closed Phoenix exercised its option and thereby revived the former mortgage and the debts it secured. *It was impossible for Phoenix to have delegated any authority to the trustees with respect to that mortgage and those obligations because they were not in being as subsisting obligations during any of the time the federal foreclosure cause was being pleaded to issue and tried.*

Quite obviously, therefore, there could have been no agency in the trustees to have represented Phoenix with respect to the mortgage obligations in suit below.

Specifications of Error

I

The Supreme Court of Iowa in its opinion (R. 1923-1937, 20 N. W. (2d) 457) wholly failed to consider the foregoing relevant and controlling facts (see "Statement of the Case," *ante*, pp. 10-19) relating to Phoenix' lack of status as an indispensable party to the cause of action in which the decree asserted as *res adjudicata* was rendered, and to the lack of authority in the plaintiff-trustees to represent Phoenix as to the issues subsequently raised in the case below.

II

By reason of its failure to take cognizance of the relevant controlling facts the Supreme Court of Iowa failed to recognize and apply the following principles:

(a) The purported adjudication of Phoenix' underlying contract debts, due from Bridge Company and reinstated by the invalidating of bonds exchanged therefor, was an

independent [16] issue to which Phoenix would have been an indispensable party, and as to which such purported adjudication federal jurisdiction based upon diversity was wholly absent.[17]

(b) The effect of the federal decree as an adjudication *in personam* against Phoenix can only be justified upon the doctrine of trustee representation, in which event the trustees' agency must appear from the trust instrument, expressly or by clear implication.

(c) Absent such agency, the federal court could not adjudicate the invalidity of any debt evidenced by any Phoenix bond, much less any earlier debt arising by virtue of Phoenix' loans and advances to Bridge Company, which, though merged in bonds exchanged therefor, were reinstated upon the validity of bonds being challenged.

III

The Supreme Court of Iowa entirely overlooked the undisputed further facts (a) that the $50,000 mortgage in suit is, by its terms, security for an advance of $9,000 made by Phoenix for the account of Bridge Company, in addition to the recited $50,000 consideration; (b) that the decree in the foreclosure cause does not purport to adjudicate this item of claim, except by indirection as a part of an unpleaded set-off or counterclaim against Phoenix personally; and the further principle of law (c) that a judgment

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[16] The characterization as "independent" of the causes of action involved in the federal foreclosure cause of which the federal court did not have jurisdiction is taken from the opinion of the Supreme Court of Iowa. See 20 N. W. (2d) p. 461, R. 1930.

[17] The issue the purported adjudication of which is here charged against Phoenix was just as "independent" an issue as Bridge Company's cross-complaint for cancellation of bonds, and Phoenix' claim, on motion for rehearing, for the return to it of 517 shares of Bridge Company stock which had been traded for bonds subsequently invalidated.

or decree based upon an unpleaded set-off or counterclaim against one not an indispensable party and not expressly represented with respect to such claim, lacks the essential elements of procedural due process.

ARGUMENT

Summary of Argument

Point I

Phoenix was not an actual (as distinguished from a represented) party to the issue raised by the plaintiff-trustees' bill for foreclosure of the trust indenture in the federal court to which the responsive decree was on denying foreclosure because of absence of consideration for bonds. Its status as an actual, indispensable party was limited to the undecided and unpressed cross-complaint against it for cancellation.

Point II

Phoenix, as a bondholder, had not delegated to the plaintiff-trustees in the federal foreclosure cause, authority to represent it to the extent of litigating the consideration for any debt underlying mortgage bonds.

Point III

Since the plaintiff-trustees in the federal foreclosure cause had no authority to litigate the debt evidenced by (or underlying) the bonds, as distinct from the covenant of the indenture, the decree denying foreclosure was not an adjudication *in personam* against Phoenix, as a bondholder.

Point IV

Not only is the opinion of the Supreme Court of Iowa in conflict with the *Mackay* case in the 8th Circuit, but it is

also opposed to the general principles of trustee representation heretofore announced by the Supreme Court.

Point V

Quite apart from all other points here discussed, there was no finding against Phoenix in the federal foreclosure cause which can be construed as an adjudication with respect to an item of $9,000, part of the underlying consideration for the $50,000 mortgage.

Point I

Phoenix was not an actual (as distinguished from a represented) party to the issue raised by the plaintiff-trustees' bill for foreclosure of the trust indenture in the federal court to which the responsive decree was one denying foreclosure because of absence of consideration for bonds. Its status as an actual indispensable party was limited to the undecided and unpressed cross-complaint against it for cancellation.

There would seem to be little doubt but that the opinion of the Supreme Court of Iowa was based largely upon the supposed status of Phoenix as an *actual* party. Thus the court said (R. 1925, 20 N. W. (2d) p. 458): "On motion Phoenix was made a party as a co-plaintiff and filed answer to the petition for intervention." At another point (R. 1925, 20 N. W. (2d) p. 458): "Phoenix, after having been brought in as a party plaintiff, moved to dismiss for want of federal jurisdiction." With a proper understanding of the true factual situation and the deletion of the unjustified emphasis on Phoenix' supposed status, when applied to the action to foreclose the indenture, as distinguished from the action to cancel bonds, petitioner submits that a different result thereby logically evolves.

It is suggested that the naming of Phoenix as a "party plaintiff" as well as a "defendant" to the petition for intervention is not *per se* entitled to significance. The question is: As to what issue was Phoenix properly made an actual adversary party? Obviously only to the issue raised by the cross-complaint for cancellation. This Court in *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, held that the principles governing the alignment of parties for purposes of determining diversity of citizenship are (1) to "look beyond the pleadings and arrange the parties according to their sides in the dispute", and (2) to ascertain from the "principal purpose of the suit", and the "primary and controlling matter in dispute" whether the necessary "collision of interest" exists.

Phoenix was an indispensable party to the cross-complaint for cancellation but that issue was not determined and if it had been determined, it would have been a nullity because it involved an "independent" action by a Delaware corporation against a Delaware corporation. As recognized by the Supreme Court of Iowa (R. 1930, 20 N. W. (2d) p. 464) Phoenix would have been an indispensable party to a claim on its part to recapture 517 shares of Bridge Company stock which it had exchanged for bonds, invalidated by the decree. As to that issue no federal jurisdiction existed. The choses in action asserted below are even more remote, as related to the issues of the federal foreclosure cause. Those choses in action were dormant and not capable of being litigated until the bonds for which they had been exchanged were invalidated and Phoenix had exercised its right to reinstate them. Any adjudication of those choses in action would necessarily have required Phoenix as an indispensable party in any event and, since a Delaware corporation was debtor and a Delaware corporation was creditor, federal jurisdiction could never have existed. But, as held, Phoenix was only a "nominal or formal" party.

The federal court did in fact order that Phoenix be made a party and, in pursuance thereof, process issued and Phoenix appeared and answered. As the order attempted to define the status and alignment, Phoenix was made a party "plaintiff in this cause" and a party defendant "to the petition for intervention". *But the federal court had no power to make Phoenix a plaintiff, with the trustees, in the action for mortgage foreclosure.*

It has never been suggested that a federal district court has either the power or the jurisdiction in an action of A vs. B, either on A's motion, B's motion, or its own motion, to order that C be made a plaintiff as to A's action against B.[18] However, this is exactly what the federal court purported to do if we are to consider the order as effective in bringing a new plaintiff to the bill of foreclosure, as distinguished from the status of that party as a defendant to the cross-complaint for cancellation.

Of course it is quite clear what was in the mind of the court and the moving party. The petition for intervention (the cross-bill), and later the amended answer of the Bridge Company (the answer to the cross-bill), asserted a cause of action *in personam* against Phoenix.[19]

Petitioner agrees fully with the statement contained in the opinion of the Supreme Court of Iowa (R. 1930, 20 N. W. (2d) pp. 460, 461) that "The making of Phoenix a party plaintiff therefore had to be based on the theory that there was no independent issue between Phoenix and the Bridge Company thereby introduced * * *" Petitioner's chal-

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[18] This cannot be one even under the present Rules of Civil Procedure relating to third party practice (Rule 14). These rules were not in force at any time during the pendency of the Foreclosure Cause, and as the Advisory Committee said with respect thereto: "Third party interpleader is in some aspects a modern innovation in law and equity although well known in admiralty."

[19] If we disregard the fact that there is no pleading naming Phoenix Finance Corporation as an adversary party in interest.

lenge is that the court failed to apply this principle to the record facts above outlined. For the decree to have been *res adjudicata* of Phoenix' $50,000 mortgage, $50,000 note and $9,000 quasi-contract claim (claims not then capable of enforcement) an "independent issue" would, of paramount necessity, have had to be framed between Phoenix (a Delaware corporation) and Bridge Company (a Delaware corporation).

Added emphasis is placed upon the point here under consideration, by the holding of the court relating to Phoenix' claim to the return to it of its 517 shares of Bridge Company stock.[20] In its opinion the Supreme Court of Iowa said (R. 1937, 20 N. W. (2d) at p. 464):

> "We are more impelled to this view by reason of the fact, already pointed out, that the doctrine of res adjudicata, to the extent it is applied here, gives incidental effect to the decree of the federal court quite beyond any jurisdiction it would have had to decide the matters directly. *Phoenix' demand for a reissue or return of the stock was properly refused in the bond litigation because it was the subject of a controversy between Phoenix and the Bridge Co., not incidental or ancillary to the then pending suit and with no diversity of citizenship between the parties to support the court's jurisdiction to pass on it.*"

To paraphrase the foregoing and to apply the same to the point here being discussed—

> Bridge Company's and intervener's demand for the cancellation of Phoenix' bonds was the subject of a controversy between the Bridge Company and Phoenix, not incidental or ancillary to the then pending suit and with no diversity of citizenship between the parties to support the court's jurisdiction to pass on it.

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[20] The second cause of action below, not directly involved in this petition.

It is submitted that the federal district court properly refused Phoenix' petition for rehearing and modification, not only as to its 517 shares, but also as to a requested reservation "from adjudication the question of the validity of the $50,000 mortgage," and as to requested permission "to institute an action at law against the Bridge Company * * * for money had and received," *not because of an adjudication in personam and on the merits against Phoenix on any of those issues, but because Phoenix was not an actual party, in fact or in law, to the only justiciable controversy within the court's jurisdiction, and because, for the court to make a definitive order on either of the three requested points, would have been responsive to issues which existed solely between opposed parties who were citizens of the same state.*

The Supreme Court of Iowa, it is submitted, had, on the whole, a proper conception of the legal principles applicable to the case but went afield in their application. Thus that court said (R. 1929, 20 N. W. (2d) at p. 460):

> "The validity of any obligation of indebtedness purporting to be secured by the trust deed was put in issue *only in order to determine whether the lien of the trust deed should be resorted to for its payment.*" [20a]

Again (R. 1930, 20 N. W. (2d) at p. 460):

> "The inquiry into the validity of the bonds held by Phoenix was only for the purpose of determining *whether they were secured by the lien of a valid trust deed. The trustees had no interest in the matter beyond that point.*"

This is wholly consonant with *Kerrison* v. *Stewart, infra,* that trustees represent bondholders in matters "relating to their common interest in trust property." Thus far, but

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[20a] Italics are the court's.

no farther, said the Iowa Supreme Court, was Phoenix' interest as a bondholder represented by the plaintiff-trustees. Beyond that federal jurisdiction could not be extended (R. 1930, 20 N. W. (2d) at p, 460). The result is inescapable (and with this petitioner is in entire agreement) that the quality of the decree denying foreclosure, as an adjudication to support a defense of *res adjudicata* against Phoenix, "had to be based on the theory that there was no independent issue between Phoenix and the Bridge Company thereby introduced" (R. 1930, 20 N. W. (2d) at pp. 460, 461).

Then, with striking lack of logic, the Supreme Court of Iowa proceeded to hold (1) that Phoenix' claim for the recapture of 517 shares of Bridge Company stock exchanged for bonds was such "independent issue" and no adjudication, but (2) that Phoenix' claim of right to recapture its choses in action based upon the $50,000 mortgage, also exchanged for bonds, was adjudicated adversely to it and would support the plea.[20b]

It is submitted that the federal "jurisdictional integrity" to which the Supreme Court of Iowa makes unctuous reference (R. 1930, 20 N. W. (2d) at p. 460) has had violence done it in one instance or the other.

Point II

Phoenix, as a bondholder, had not delegated to the plaintiff-trustees in the federal foreclosure cause, authority to represent it to the extent of litigating the consideration for any debt underlying mortgage bonds.

It is freely conceded that Phoenix, a bondholder, was represented generally by the trustees named in the inden-

[20b] See *post*, p. 38, where the same lack of logic is demonstrated with respect to the adverse adjudication of an unpleaded $14,000 alleged counterclaim of Bridge Company against Phoenix personally.

ture, in the cause of action for mortgage foreclosure, and that Phoenix and every other bondholder is bound by *the decree denying foreclosure.* What is denied is that the trustees had any authority, either express or implied, to put in issue, *so as to bind bondholders in personam,* the debt evidenced by the bonds and the considerations therefor (much less preexisting debts which had merged in bonds and were only reinstated after the bonds were invalidated), because this is a matter quite different from putting such debt in issue on a justiciable question referable to the limited purposes of the trust, viz.: *Shall the security be foreclosed by a court of equity?*

The point to which the attention of the court is directed is the express limitation on the delegation of authority by the bondholders to the trustees, as evidenced by the indenture. With respect to the mortgage (the trust *res*) and the lien thereof, authority is delegated by bondholders to the trustees in broad language, but the express grant of power *as to the execution of the trust* and *the enforcement of the lien* serves to underline the equally express withholding of authority *to litigate the debt* as the basis of an *in personam* judgment against bondholders.

It is, of course, basic that trustees' authority to act as agents for and, by their acts, to bind bondholders, must clearly appear. As this court said in *Kerrison* v. *Stewart, infra* (93 U. S. at p. 161): "It remains to determine whether Charles Kerrison was authorized to represent creditors in proceedings against him to defeat the title so held for their security. This depends upon the intention of the parties, as expressed in the deed creating the trust and making him the trustee." In fact, restrictions upon bondholders' rights, being in derogation of the common law, are to be strictly construed. *Japka* v. *Delaware Valley Utilities Co.,* 40 Del. 599, 15 A. (2d) 432 (1940). "The common law right

to sue upon the notes is not affected by the remedies provided in the indenture unless its provisions exclude their right by express terms or necessary implications." *Halle* v. *Van Sweringen Corp.*, 37 Del. 491, 185 Atl. 236 (1936). To the same effect is *Manning* v. *Norfolk S. R. Co.*, 29 F. 838 (C. C. E. D. Va. 1887). See also: 6 *Fletcher, Cyc. Corp.*, Sec. 2751, p. 616; 7 *Fletcher, Cyc. Corp.*, Sec. 3180, p. 344.

As heretofore shown no agency existed in the trustees to put the bond debt in issue, except as an incident to foreclosure, and not in any event as the basis of a decree *in personam* against a bondholder on the debt evidenced by his bonds. Even more remote and even more fantastic is the idea for which the decisions below stand, viz., that the trustees were the agents of Phoenix to litigate the preexisting debts of the Bridge Company to Phoenix, created prior to the bond issue and the execution of the trust indenture, extinguished contemporaneously with the bond issue by reason of being exchanged for bonds, and reinstated only after the federal foreclosure litigation as the result of a contractual arrangement which gave Phoenix the right to revive the preexisting debts upon the invalidating of the bonds for which they had been traded.

Point III

Since the plaintiff-trustees in the federal foreclosure cause had no authority to litigate the debt evidenced by (or underlying) the bonds, as distinct from the covenant of the Indenture, the decree denying foreclosure was not an adjudication in personam against Phoenix, as a bondholder.

The conclusion of the Supreme Court of Iowa is in head-on conflict with a decision of the United States Circuit Court of Appeals for the 8th Circuit in a similar factual situation. In *Mackay* v. *Randolph Macon Coal Company*

(8 Cir.), 178 F. 881, the essential facts were as here shown.[21]

The Coal Company had outstanding in the hands of the public $3,000,000 of bonds secured by a mortgage on all of the properties. A New York bank was trustee. Upon default in the payment of interest the trustee brought an action to foreclose the mortgage. The bill asked for the sale of the mortgaged property and also for a deficiency judgment in case the proceeds of the sale should be insufficient to pay the amount due. Foreclosure was granted, the property brought only $100,000 at the sale and a deficiency judgment was entered. The Coal Company then went into bankruptcy, the trustee proved a claim for the deficiency and the same was allowed.

The bondholders claimed fraud on the part of the officers and promoters of the Coal Company in the issuance of the bonds and that $5,000,000 of stock had been issued without consideration. The trustee in bankruptcy thereupon brought suit against the stockholders to recover the par value of the stock as unpaid subscriptions. The only claim

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[21] The authority of the *Mackay* case is not in any way affected by the fact that it was decided before the 1925 Amendment to Equity Rule 10 (former Rule 92). Even before that amendment, it was held that a mortgage trustee could sue for the debt in a foreclosure proceeding if the indenture gave such authority. *Continental-Equitable Title & Tr. Co.* v. *National Properties Co.* (D. C. Del. 1921), 273 Fed. 967, held that under the indenture "the legal title to the debt or chose in action vested in the trustee upon declaration and demand" and that the trustee might seek a deficiency decree in a foreclosure cause. But no case appears where the purely procedural aspect of Rule 10 makes one an agent in fact when such authority is denied by the Indenture. To so hold would affect substantive, as well as procedural rights of the parties. Cf. *Fidelity-Philadelphia Tr. Co.* v. *Hale & Kilburn Corp.* (D. C. Pa., 1937), 24 F. Supp. 3. *In the instant case the "declaration and demand" which otherwise might be construed as vesting the legal title to the bonded debt in the trustees was never given* (See footnote 14, p. 16). Only one principle announced by *Mackay v. Randolph Macon Coal Company* is changed by the 1925 amendment to Rule 10, viz., the bondholder-parties to an indenture securing a bond issue may now "confer upon a third party [the trustee] the naked right to sue thereon."

proved in the bankruptcy proceeding was the deficiency decree and it was felt that the trustee in bankruptcy had no higher right than the holder of that claim, the mortgage-trustee. Because of apprehension that the mortgage-trustee might not be a "creditor" of the bankrupt, under whom the trustee in bankruptcy might maintain the creditors' bill against stockholders on their unpaid subscriptions, the holders of the bonds secured by the mortgage thereupon made proof of their bonds before the referee. The referee was of the opinion that the bonds merged in the deficiency judgment and disallowed the claim. Affirmed by district court. Reversed by circuit court of appeals.

It will thus be seen that the *Randolph Macon Coal Company* case presented the primary legal question here under consideration: Did the mortgage trustee represent the bondholders so that the decree in the mortgage foreclosure action precluded them from asserting their rights independently on the bonds? The result would have been precisely the same if foreclosure had been denied rather than granted. The mortgage, similar to the mortgage involved in the federal foreclosure cause *sub judice* contained a covenant by the mortgagor to pay the principal and interest of the bonds. The mortgage delegated to the trustee for right to report to "any appropriate proceeding * * * for * * * foreclosure, enforcement or satisfaction of the mortgage, or of the bonds secured thereby, *against or with reference to any property* [22] which is or may become security for the payment of the bonds, or subject to the trust." [23]

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[22] Italics are the court's.

[23] Compare this grant of power with that contained in the Indenture in this case (F. R. 38) that the trustees "shall proceed to protect and enforce their rights and the rights of the bondholders under this Indenture by a suit or suits in equity, or at law, whether for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for any foreclosure hereunder, or for the enforcement of any other appropriate, legal or equitable remedy,

Actually *Mackay* v. *Randolph Macon Coal Company* makes out factually a much stronger case in favor of trustee representation than does the case *sub judice*. In the *Mackay* case the reserved right of bondholders was *implied*. Here, the reservation is express. Furthermore, in the *Mackay* case the court was dealing with the agency of the trustee to collect the debt evidenced by bonds. Here we are dealing with the agency of the trustees to litigate underlying and pre-existing debts for which bonds had been exchanged, and which debts *per se* were later revived.

In reversing the district court and holding that the bondholders might prove their claims on the bonds, independently of the mortgage-trustee's claim on the deficiency decree, the Circuit Court of Appeals said (pp. 884-885):

> "The foreclosure suit in which the deficiency decree was taken has this distinctive feature: The trustee under the mortgage was not the owner or holder of the bonds which it secured. In the ordinary foreclosure the mortgagee and the payee of the debt are the same. In such a case the person entitled to the decree on foreclosure is likewise entitled to a judgment at law upon the note or bond, and the court of equity in which suit is brought to foreclose the mortgage may, for the purpose of giving full relief, grant a deficiency decree, instead of turning the plaintiff over to an action at law * * *. When the mortgagee is also the holder of the note or bond which it secures, the deficiency judgment will be referred to the bond or note as its cause of action, and will bar any subsequent action thereon [Case cited]. In the present case the trustee under the mortgage is neither the holder nor the payee of the bonds. It clearly

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as the Trustees, being advised by counsel learned in the law, shall deem most effectual to protect and enforce the rights aforesaid." Also compare the *express* reservations to the bondholders in the instant case of their right to litigate the debt on the bonds, with the *implied* reservation in the *Mackay* case quoted at p. 883 of the report.

could not have maintained an action at law for their collection. We are aware that the fifteenth article of the mortgage authorizes the trustee to collect and recover the principal and interest of the bonds for the owners and holders thereof. This may have reference to their collection by the enforcement of the security. If that is not its meaning, we are of the opinion that it could not confer upon the trustee the right to maintain an independent action upon the bonds. Who may maintain a suit is a matter of law, not subject to be controlled by the private conventions of parties [Citing cases]. Parties to a contract cannot confer upon a third party the naked right to sue thereon. Suits, whether under chancery or code practice, must be brought in the name of the real party in interest. The only exceptions to that rule here important are these: (1) the trustee of an express trust may maintain an action in his own name on behalf of the beneficiary. To come within this exception, however, the trustee must be the holder of the property or obligation out of which the action arises. *Here, as already pointed out, the trustee under the mortgage is not the holder of the bonds.* (2) A person with whom or in whose name a contract is made for the benefit of another may maintain an action upon the contract. *The trustee under the mortgage comes within this exception as to the security, but not as to the bonds, for they are not payable to the trustee. The deficiency decree, therefore, must be referred to the covenant in the mortgage, and like the mortgage itself, is collateral to the bonds, and constitutes no bar to an action thereon. The debt underlying both is the same, but the promises are distinct and give rise to separate causes of action.* This view finds added support in the provision contained in the twenty-third article of the mortgage that the remedies which it confers upon the trustee shall not be treated as exclusive of any right of the bondholders, but as cumulative."

Point IV

Not only is the opinion of the Supreme Court of Iowa in conflict with the Mackay case in the 8th Circuit, but it is also inapposite to the general principles of trustee representation heretofore announced by the Supreme Court.

The *Mackay* case has never been disapproved by the U. S. Supreme Court, nor, so far as counsel are able to ascertain, been commented upon adversely in any other circuit. Furthermore, the case is cited with approval in later cases in Circuit Courts of Appeal: *Des Arc & Pohatan Bridge Co.* v. *Austin Bridge Co.*, 94 F. (2d) 494 and *Blumgart* v. *St. Louis-San Francisco Ry. Co.*, 94 F. (2d) 712 (8th Cir.); *In re Ebeling*, 123 F. (2d) 520 (7th Cir.); *Fitkin* v. *Century Oil Co.*, 16 F. (2d) 22 (2d Cir.). The authority of the *Mackay* case was also recognized *In re A. J. Ellis, Inc.*, 242 Fed. 156 (D. C., N. J.) affd. 252 Fed. 483 (3d Cir.). In *Lane* v. *Equitable Trust Co.*, 262 Fed. 918 (8th Cir.). and *Central Hanover Bank & Trust Co.* v. *Siemens & Halske Co.*, 15 F. Supp. 927 (D. C., S. D., N. Y.) affd. 84 F. (2d) 993 (2d Cir.) the case is distinguished, thereby recognizing its continuing authority.

On the same point but without citing the *Mackay* case, is *United States Trust Co.* v. *Gordon*, 216 F. 929 (6th Cir.). The earlier case of *National Salt Co.* v. *Ingraham* (2d Cir.), 143 F. 805 also announces the precise principle that a mortgage trustee does not (absent express authority) represent bondholders as to the debt owed them and *Kerrison* v. *Stewart*, *Shaw* v. *Railroad Co.*, and *Richter* v. *Jerome*, *infra*, are all cited as authority therefor. See also: *Moran* v. *Hagerman* (9th Cir.) 64 Fed. 499.

The principles for which the *Mackay* case is the only direct federal authority are fully consonant with the

prior pronouncements of this court on the general subject of trustee representation. This court has recognized that one who sues as representative of a class must have an actual interest in the controversy in like right with those he proposes to represent. *Georgetown* v. *Alexandria Canal Co.*, 37 U. S. 91. Trustees represent bondholders only in matters "*relating to their common interest in the trust property.*" *Kerrison* v. *Stewart*, 93 U. S. 155.

In *Shaw* v. *Railroad Co.*, 100 U. S. 605 and in *Richter* v. *Jerome*, 123 U. S. 233, this court has recognized that a mortgage trustee's right of representation relates to matters "affecting his trust"—"in the security * * * which the trustee holds and represents." *Beals* v. *Railroad Co.*, 133 U. S. 290 is not apposite because there the judgment relied upon as *res adjudicata* was itself a direct equitable action for cancellation of bonds "held by the defendants", the trustees, for the benefit of bondholders, many of whom were also parties defendant. Likewise in *Elwell* v. *Fosdick*, 134 U. S. 500, a trustee who had admitted authority "to collect the mortgage debt * * * at the request of the holders of a majority of the bonds" gave a release on the authorization of such majority. The release was held binding upon bondholders by right of representation.

This court in *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, said (p. 194):

> "The complainants were trustees under the mortgage, and had no personal interest in the bonds but held legal title to the mortgage, which they were foreclosing for the benefit of others."

In *Kersh Lake Drainage Dist.* v. *Johnson*, 309 U. S. 485 this court recognized that bondholders are bound by an adverse decree where an indenture trustee, in good faith, exercises "*his contractural authority to represent and assert the lien securing the issue.*"

Therefore, it may be asserted with assurance that this court has recognized the representative quality of a trustee's acts (1) where authority is given by contract, or (2) where the trustee's act is referable to the *res* in trust. In the instant case (a) contractual authority was lacking and was, in fact, expressly denied and (b) the underlying consideration for debts which, in turn, were the considerations for the issuance of bonds secured by an indenture were not a part of the "trust property" and the bondholders and mortgage trustees had no "common interest" therein.

Furthermore, even though the federal district court had purported to cancel bonds for invalidity, such action would not have affected the $50,000 mortgage and the debts it secured, because here, as shown, it had been specifically agreed that the $50,000 mortgage became per se enforceable by Phoenix upon an attack being made upon the bonds which had been issued in exchange therefor.

Point V

Quite apart from all other points here discussed, there was no finding against Phoenix in the federal foreclosure cause which can be construed as an adjudication with respect to an item of $9,000, part of the underlying consideration for the $50,000 mortgage.

The Supreme Court of Iowa obviously overlooked the undisputed fact that the $50,000 mortgage was an "open mortgage" providing for further anticipated financing beyond the $50,000 note and that the same included a further advance by Phoenix of $9,000 to pay liens. The $50,000 note was made up of two items of $35,000 and $15,000 respectively, which were the subject of specific findings in the federal foreclosure cause. But, as shown, the mortgage given to secure the $50,000 note was also made security for further contemplated advances by Phoenix, and on Novem-

ber 10, 1931, Phoenix had loaned to the Bridge Company the further sum of $9,000 in reliance upon the covenants of the $50,000 mortgage. The loan was made and used for the purpose of paying the Bridge Company's indebtedness to a contractor for grading work on the bridge project, which indebtedness constituted a lien on the bridge property for which the Bridge Company was liable.

The Master found that "the Bridge Company received full consideration for the said $9,000 thereof issued to Kramer & Hogg in settlement of a mechanics' lien claim" (F. R. 132, 182). The federal district court took the position with respect to the $9,000 item and a certain note for $3,125, that the Bridge Company had a counterclaim or set-off against Phoenix in the sum of $14,000 which more than covered these two items (F. R. 177, 178). But no set-off or counterclaim was asserted by any pleading,[24] and even if this issue had been raised, it would have involved solely a controversy between two Delaware corporations as opposing parties. It was in no way an ancillary issue in the federal foreclosure cause.

It seems entirely clear that the procedural situation as concerned the $9,000 additional advance, points up in unmistakable fashion petitioner's basic premise that there was an attempted adjudication against Phoenix personally in the federal foreclosure cause as the result of an equally unmistakable "independent" issue between Phoenix and the Bridge Company, viz., the unpleaded (as well as unproved) counterclaim of the Bridge Company that Phoenix had 140 shares of $100 par value stock for which it had paid no consideration.

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[24] Set-off is an affirmative defense and must be affirmatively pleaded in equity as well as law in order that advantage may be taken thereof by the party in whose favor it is assertable. *McGowan* v. *American Pressed Tan Bark Co.*, 121 U. S. 575; *United States* v. *Mitchell*, 205 U. S. 161.

The undisputed $9,000 advance of Phoenix for the account of the Bridge Company to pay liens on the bridge, remains unchallenged by any finding as to the bona fides of the considerations therefor which had been received and retained by the Bridge Company. That item and the $3125 note item were simply ignored in the federal foreclosure cause because of the supposed existence of a $14,000 counterclaim of Bridge Company against Phoenix—a counterclaim found only in the opinion of the federal district court, not asserted by any definitive pleading by or on behalf of Bridge Company, and, if it had been so asserted, a claim between adversary Delaware corporations, entirely without the jurisdictional cognizance of a federal court.

Petitioner submits that the statement in the opinion of the Supreme Court of Iowa (R. 1930, 20 N. W. (2d) at p. 460) that "the validity of the obligations represented by the Phoenix bonds in the foreclosure suit * * * could not have been litigated for the purpose of a deficiency judgment in favor of Phoenix" because this "would have been a matter between Phoenix and the Bridge Company between whom there was no diversity of citizenship," applies forcefully both to the litigation of Bridge Company's supposed $14,000 counterclaim and to its cross-complaint for cancellation of bonds. Both subjects were without the jurisdiction of a federal court.

The District Court of Allamakee County, Iowa, has decreed the cancellation of the $50,000 mortgage because of the supposed effect of the federal decree as *res adjudicata*. This has been affirmed by the Iowa Supreme Court and the issuance of a *procedendo* only awaits the determination of this petition. This will wipe out the security for the $9,000 advance (and the $9,000 debt itself) as well as the security for the initial advances. Whatever may be said on other issues, Phoenix has certainly not had its day in court for

the purpose of asserting the mortgage as security for its $9,000 loan to Bridge Company. To deprive it of the benefit of that security is a denial of due process.

Conclusion

It would be a work of supererogation for petitioner to burden this brief with citations of authorities on the question of federal jurisdiction (or lack thereof) under the statutory diversity requirement. Herein petitioner takes the position that the federal district court had jurisdiction of the parties and the issues in the foreclosure cause but that petitioner was not a party to those issues. However, it is not intended thereby to preclude this court, as an alternative approach, from reviewing (even collaterally in these proceedings) the question of federal jurisdiction in the original foreclosure cause after Phoenix was impleaded as a party "plaintiff" and as a party "defendant" to the intervention petition or cross-complaint. *It is inescapable either that Phoenix was not a party to support a judgment in personam against it, or, if such a party, that federal jurisdiction was ousted and the decree relied upon as an adjudication falls.*

Petitioner has heretofore raised the question of "due process" under the 14th Amendment as applied to the case at bar. The raising of the bar of a judgment or decree with respect to unpleaded and undecided issues, in a case where the party, against whom the judgment or decree is asserted as defense, was neither an indispensable nor a represented party, is an obvious denial of due process. As to the mortgage and debts in suit, petitioner has not had its day in court. *Hurtado* v. *California,* 110 U. S. 516; *Murray* v. *Hoboken Land, &c., Co.,* 59 U. S. 272.

The decision of the Supreme Court of Iowa is violative of the 14th Amendment.

It is respectfully submitted that this case is one calling for the exercise by this Court of its discretionary jurisdiction in order that the aforesaid manifest error may be corrected and petitioner accorded due process in the litigation of its just claims. To this end, a writ of certiorari should be granted in order that the Court may review the decision of the Supreme Court of Iowa and reverse the same.

JAMES R. MORFORD,
Attorney for Petitioner.

(3934)

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 1076.

PHOENIX FINANCE CORPORATION, a Delaware Corporation, *Petitioner,*

V.

IOWA-WISCONSIN BRIDGE COMPANY, a Delaware Corporation, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF OF RESPONDENT, IOWA-WISCONSIN BRIDGE COMPANY.

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IN THE

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OCTOBER TERM, 1945.

No. 1076.

PHOENIX FINANCE CORPORATION, a Delaware Corporation, *Petitioner*,

V.

IOWA-WISCONSIN BRIDGE COMPANY, a Delaware Corporation, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF OF RESPONDENT, IOWA-WISCONSIN BRIDGE COMPANY.

OPINIONS BELOW.

Findings of fact, conclusions of law and decree of District Court of Iowa, in and for Allamakee County, R. 231-252. Opinion of Supreme Court of Iowa, R. 1923-1937, reported 20 N. W. (2d.) 457.

Opinions in the Federal Cause: United States District Court opinion, findings of fact and decree, F. R. 156-204 and 19 F. Supp. 127; affirmed Eighth Circuit Court of Appeals, F. R. 1689-1709 and 98 Fed. (2d.) 416; certiorari denied, 305 U. S. 650; rehearing denied 305 U. S. 676.

In supplemental and ancillary proceedings in federal cause, opinion of United States District Court, 32 F. Supp. 277; affirmed Eighth Circuit Court of Appeals, 115 Fed.

(2d.) 1; certiorari granted 312 U. S. 670; reversed on other ground 314 U. S. 118; rehearing denied 314 U. S. 385.

Opinion of the Supreme Court of the State of Delaware, Iowa-Wisconsin Bridge Company, defendant below, plaintiff in error v. Phoenix Finance Corporation, plaintiff below, defendant in error, R. 178-198 and 25 Atl. (2) 383; certiorari denied 317 U. S. 671.

Petitioner Phoenix omits citing or referring to the decision of the Delaware Supreme Court. *The decisions of the Federal Courts and of the Delaware Supreme Court demonstrate that Phoenix' present petition and brief is but a repetition of what has been previously presented and decided.*

JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code (28 U.S.C. Sec. 344(b)).

Petitioner claims there is involved a question of due process under the Fifth and Fourteenth Amendments to the Constitution of the United States. This claim is denied by respondent for the reasons following:

(a) That the record does not furnish any basis for such claim.

(b) This question is not shown to have been presented to the court below.

White River Lumber Co. v. State of Arkansas, 279 U. S. 692, 700;

Rule 12, Par. 1.

(c) The cases cited by petitioner on page 5 of its petition with respect to this contention are not in point, in that all of those cases involved situations where the party sought to be bound by a former judgment was not a party, personally or by representation, or in privity with a party, in the case wherein the former judgment was rendered.

(d) Petitioner's claim of want of due process under

the Fifth and Fourteenth Amendments to the Constitution was a matter for it to assert in the original case in the Federal Court and if its claim was there denied its remedy was to appeal to the Circuit Court of Appeals and ask a reversal on that ground, and if its appeal was denied, to petition this Court for certiorari on the same ground. It could not attack the decree collaterally on that ground when it was invoked against it in the Iowa Courts, nor can it thus collaterally attack such decree before this Court.

Roller v. Murray, 234 U. S. 738, 34 S. Ct. Rep. 902.

Doctrine of due process under 14th Amendment to the Constitution does not involve the right to litigate the same question twice.

Chicago Life Ins. Co. v. Cherry, 244 U. S. 25, 37 S. Ct. 492, 61 L. Ed. 966.

STATEMENT OF THE CASE.

Phoenix' statements, pages 2-4 of its petition and 10-19 of its brief, are so inaccurate and incomplete that it is necessary for respondent to submit a statement of the case pointing out such inaccuracies and omissions as concisely as possible.

The United States District Court, for the Northern District of Iowa, in the Federal cause 19 F. Supp. 127 and in ancillary proceedings 32 F. Supp. 277 held that the matters here involved were adjudicated; this was affirmed by the Eighth Circuit Court of Appeals in 98 Fed. (2d.) 416 and in 115 Fed. (2d.) 1; the Supreme Court of Delaware held that the matters were previously adjudicated and that the petitioner was bound by such adjudication, R. 178-198, reported 25 Atl. (2) 383. The District Court of Iowa, in and for Allamakee County, R. 231-252, and the Supreme Court of Iowa, R. 1923-1937, reported 20 N. W. (2nd) 457, have held that the matters asserted in peti-

tioner Phoenix' petition have been previously adjudicated.

This Court has repeatedly held that the concurrent decisions of two courts upon a question of fact will be followed unless very clearly shown to have been erroneous, and there is no such showing in the instant case.

Brainard v. Buck, 184 U. S. 99;

Dunn v. Lumbermen's Credit Ass'n., 209 U. S. 20;

Alabama Power Company v. Ickes, 302 U. S. 464.

This action was brought by the petitioner for recovery on an alleged note and mortgage of the Bridge Company, dated March 10, 1931, in the sum of $50,000, with interest, and for the recovery of a $9,000 item it claims to have paid to Kramer & Hogg, and a $10,000 item claimed to have been paid to the Industrial Contracting Company, and a $11,262.71 item claimed to have been paid to McClintic-Marshall Company, and for the recovery of 517 shares of stock of the Bridge Company (R. 2-8 and R. 231, lines 22 to 34 and R. 232, lines 1 and 2).

The Bridge Company's answer alleged defense of *res judicata* based on the decisions of the United States District Court, for the Northern District of Iowa, and of the Eighth Circuit Court of Appeals, and of the Supreme Court of the State of Delaware, and said answer asked that said decisions be given full faith and credit and due force and effect under Section 1, Article 4 of the Constitution of the United States, and Section 905 of the U. S. Revised Statutes, and under Sections 1 and 2 of Article 3 and Section 2 of Article 4 of the United States Constitution and under Judicial Code Section 237(b) (R. 18-37). Copies of rulings, findings and decisions attached to answer as Exhibits "A", "B", "C", "D", "E", "F", "G", "H", "I", "J", and "K" (R. 37 and 66-198).

Phoenix' reply admitted that said Exhibits were true and correct copies (R. 40-41 and R. 42, lines 5 to 13).

Respondent offered in evidence defendant's Exhibit "1"

(6 volumes and supplement) certified record of proceedings in the United States District Court, for the Northern District of Iowa, in the cause, entitled, *First Trust & Savings Bank and A. H. Schubert, as Trustees, and Phoenix Finance Corporation, v. Iowa-Wisconsin Bridge Company, defendant, and Fayette D. Kendrick, et al., interveners;* also the record of the proceedings in the same case in the United States Circuit Court of Appeals for the Eighth Circuit.[1] (R. 199, Defendant's Exhibit "1" certified exemplified copy of certification of said record filed with the United States Clerk, 19 F. Supp. 127, 98 Fed. (2) 416; Stipulation, par. 2, R. 1951).

Respondent also offered in evidence defendant's Exhibit "2" transcript of testimony on original trial in the Federal Court which by stipulation is not set forth in record before this court because already set forth in narrative form in defendant's Exhibit "1" (R. 200; Stipulation, par. 3, R. 1951); and offered defendant's Exhibit "3" certified exemplified copy of opinion Eighth Circuit Court of Appeals which is set forth in Federal record Volume 6 (F. R. 1689-1709) and 98 Fed. (2) 416 (R. 201; Stipulation, par. 4, R. 1951); and offered certified copy mandate of the United States Eighth Circuit Court of Appeals (Exhibit "4", R. 201 and R. 1780-1783); and offered Exhibit "7" certified exemplified copy stipulated record in Supreme Court of Delaware in case, entitled, Iowa-Wisconsin Bridge Company, a corporation, defendant below, plaintiff in error, vs. Phoenix Finance Corporation, a corporation, plaintiff below, defendant in error (R. 202 and R. 1786-1917; Stipulation, par. 6, R. 1951-1952), and offered Exhibit "5" certified exemplified copy of pleadings in said Delaware cause

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[1] 1939 Code of Iowa, Section 11305:
"JUDICIAL RECORD—STATE OR FEDERAL COURTS. A judicial record of this state or any court of the United States may be proved by the production of the original, or a copy thereof certified by the clerk or person having the legal custody thereof, authenticated by his seal of office, if he have one."

set forth in stipulated record (R. 201-202; Stipulation, par. 7, R. 1952 and R. 1790-1800); and offered Exhibit "6" certified exemplified copy of writ of error Supreme Court of Delaware in said Delaware cause to Superior Court of Delaware (R. 202 and R. 1784-1785); and offered Exhibit "8" certified exemplified copy of Bridge Company's brief and argument filed in said Delaware cause in the Supreme Court of Delaware, one additional copy of which is filed herein under stipulation (R. 203; Stipulation, par. 9, R. 1952); and offered Exhibit "9" certified exemplified copy of brief and argument of Phoenix Finance Corporation filed in said Delaware cause in the Supreme Court of Delaware, one additional copy of which is filed herein under stipulation (R. 203 and stipulation, par. 10, R. 1952); and offered in evidence Exhibit "10" certified exemplified copy of the decision and final judgment of the Supreme Court of Delaware (25 Atl. (2) 383) which is not copied in the record because set forth as Exhibits "J" and "K" to defendant's answer in accordance with the stipulation (R. 203-204; Stipulation, par. 11, 1952, and see R. 178-199); and offered in evidence Exhibit "11" certified copy of the ruling and order of the United States Supreme Court denying Phoenix' petition for writ of certiorari to the Supreme Court of the State of Delaware in said Delaware cause (R. 204 and R. 1917).

The District Court of Iowa sustained the defense of *res judicata* and dismissed this case and entered judgment against Phoenix for costs (Findings of fact, conclusions of law and decree, R. 231-252).

The Supreme Court of Iowa affirmed, except as to said 517 shares (R. 1923-1937, 20 N. W. (2nd) 457) and denied petition for rehearing January 11, 1946 (R. 1953, 1957).

Phoenix, on page 2 of its petition and on page 11 of its brief, asserts that the Bridge Company agreed that the alleged $50,000 note and mortgage should be reinstated, citing alleged resolutions of the Bridge Company (R. 43-48).

All of the minute books of the Bridge Company were identified by Phoenix' president John A. Thompson and offered in evidence by complainants in the trial of the Federal cause (F.R. 538-541 and F.R. 590). Exhibit "6" (H.L.B.), minutes of board of directors and stockholders of Bridge Company from November 1st, 1930 to July 8th, 1933, was offered in evidence by the complainants in the federal cause (F.R. 590; Ex. "6" F.R. 861 to 1033). The particular resolutions referred to by Phoenix appear in said Exhibit "6" (F.R. 964-965; F.R. 979-981).

The Federal Court found that the Bridge Company at the time of the pretended resolutions was dominated by John A. Thompson president of Phoenix, and Phoenix, and found that the pretended note and mortgage were without consideration, fraudulent and void and that all of the alleged resolutions were fraudulent and void (F.R. 157, folio 230, F.R. 172-173, F.R. 175; Court's findings of fact 26, 37, 38 and 40, F.R. 191-192, F.R. 197-200 and F.R. 201-202).

The pretended note and mortgage were not reinstated (Court's Decree, F.R. 202-204).

The record shows without dispute that all the matters asserted in the instant case were considered and determined in the federal cause.

The District Court of Iowa in its order settling the record stated:

> "8. There is no dispute on the part of the appellant herein that the said appellant is the same Phoenix Finance Corp. as appears as co-plaintiff in the case entitled First Trust and Savings Bank et al. v. Iowa-Wisconsin Bridge Co. et al defendants, tried in the United States District Court for the Northern District of Iowa, Eastern Division before Judge George C. Scott, and appealed to the United States Circuit Court of Appeals. Likewise, neither is there any dispute that the $50,000 note and mortgage sued upon in this action, and $50,000 note and mortgage, and the $9,000 Kramer & Hogg Claim, the $10,000 Industrial Contracting Co.

Claim, the $11,262.71 McClintic-Marshall Claim, the stocks Certificate representing 517 shares of preferred stock, were all matters considered in the finding of fact and opinion rendered by the Honorable George C. Scott, Judge of the United States District Court, in the original foreclosure action and were also matters considered by the opinion rendered by the Eighth Circuit Court of Appeals on the appeal heard by the Honorable George C. Scott on December 1, 1936.

"9. Furthermore, there is no dispute on the part of the appellant herein that the plaintiff in this case and the Phoenix Finance Corp. in the case of the Iowa-Wisconsin Bridge Company tried in the Delaware Court, are the same. Further, neither is there any dispute that said Delaware Court in said cause, held that the note for $2,000 and the note for $3,125 were Res judicata in the aforesaid cause of action in the United States District Court Case.

"10. The Court believes that the proposed abstract of the record fully shows that the Phoenix Finance Corp., which was made a party in the action in the Federal District Court on the motion of the intervener, Fayette D. Kendrick, and that the matters on which the Phoenix Finance Corp. bases its cause of action in the case before this court were the same items of indebtedness existing between the Bridge Company and the Phoenix Finance Corp., which are mentioned in the finding of facts of the Federal District Court. *Furthermore, that attorney for the appellant, in open court, has stated that there is no issue in the pleadings in this cause, that the claims on which plaintiff bases its cause of action are not the same claims mentioned in the finding of facts and the opinion rendered by the Honorable George C. Scott in the trial of the said cause in the Federal District Court.*" (Emphasis supplied) (R. 254-255).

Phoenix assertion on page 11 of its brief, "that the federal court did not have jurisdiction of it because it had been neither an actual or a represented party to the federal foreclosure cause in respect of the debts in suit in the state court," is contrary to the record.

THE FEDERAL CAUSE.

PHOENIX WAS A REPRESENTED PARTY AND ALSO AN ANCILLARY PARTY IN THE FEDERAL CAUSE.

The federal action was instituted at the request and instigation of petitioner, Phoenix, and carried on at the expense of and under the direction of said Corporation by attorneys of its selection.[2]

The bill of complaint was filed August 28, 1933 in the name of First Trust and Savings Bank (formerly Bechtel Trust Company), resident of Iowa, and A. H. Schubert, resident of Wisconsin, as Trustees, v. Iowa Wisconsin Bridge Company, a Delaware corporation (F.R. 1-12).

Answer was filed September 25, 1933 (F.R. 62-67).

On September 26, 1933 the Court appointed a receiver of all of the property of the Bridge Company of every kind and took the same into legal custody (F.R. 68-72).

On December 5, 1933 Fayette D. Kendrick a stockholder of the Bridge Company and a citizen of Minnesota, with leave of Court, filed a petition of intervention (F.R. 73-83).

The intervener made a motion that Phoenix Finance System, Inc., and certain other corporations be made parties (F.R. 83-84, f. 119). The motion was granted. The court's order provided:

"The motion of Fayette D. Kendrick intervener to make additional parties plaintiff and defendant to the petition of intervention then came on for hearing and complainant's counsel having stated in open court that the Phoenix Finance Corporation *has succeeded* the Phoenix Finance

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[2] F.R. 537; Exhibit 28, H.E.B., F.R. 789-791; especially top 790, offered F.R. 535; Exhibit B, H.E.B. F.R. bottom 794, and top 795, offered F.R. 537; Exhibits B-1, H.E.B. (403 H.L.B.), B-2, H.E.B. (404 H.L.B.), B-3, B-4, B-5, B-6, B-7, H.E.B., F.R. 1478-1482, F.R. 617; approved as part of narrative statement, F.R. 709, bottom 720-721, 723; Exhibit B-6, on stationery Phoenix Finance System, predecessor Phoenix Finance Corporation, signed John A. Thompson, who was president of Phoenix Finance Corporation and of its predecessor, F.R. 1481; approved as part of narrative statement, F.R. 709, 723.

System, Inc., and is the holder of the bonds involved in this action with the exception of about $10,000 worth of said bonds. It is hereby ordered and directed that the Phoenix Finance System, Inc., and the Phoenix Finance Corporation be made parties plaintiff in this cause, and defendants to the petition of intervention and the clerk of this court is hereby directed to issue the necessary processes and summons for said purpose." (Emphasis supplied) (F.R. 86).

Petition of intervention was ordered to stand as answer on part of the Bridge Company to complainants' petition (F. R. 100).

Subpoena was duly served on Phoenix Finance Corporation pursuant to said order (F.R. 87-89). Praecipe of appearance for Phoenix Finance Comporation was duly filed (F.R. 89). Phoenix Filed answer to petition of intervention (F.R. 91-92). Complainants filed reply to petition of intervention (F.R. 102-103).

Phoenix was given notice of the proceedings before the Master (F.R. 113-114). It took part in the trial not only by counsel for trustees of its selection, but it also appeared by its counsel W. B. Sloan. (F.R. 531.)

The complainants, trustees and Phoenix, called John A. Thompson, president of complainant Phoenix, as a witness in their main case, who testified as to the claimed underlying considerations for the bonds, and who was cross examined on the subject. (Direct examination, F.R. 538-542; cross examination, F.R. 542 to 545; cross examination on part of interveners, F.R. 545-556; recross examination, F.R. 560-561; further cross examination, F.R. 562-564; further cross examination on part of interveners, F.R. 633-637; F. R. 673-675; further direct examination of Mr. Thompson on part of complainants in rebuttal, F.R. 675-678; cross examination on part of interveners, F.R. bottom p. 678-685, F.R. 691-692.)

Phoenix filed exceptions to the Master's report reassert-

ing all the items involved in the instant case as considerations for the bonds stating, "Of course if the $50,000.00 mortgage, which was taken up by these bonds, was valid, then clearly, to the extent of $50,000.00 and interest the bonds are valid. We contend the record overwhelmingly supports that the bridge company gave Phoenix this mortgage for a valid and adequate consideration." (F.R. 1732 and particularly 1744-1747, same F.R. Sup. 14 particularly 26-29.)

The trustees filed exceptions to the Master's report, stating among other things, "Generally speaking, the master has approved the validity of bonds issued under the mortgage deed of trust to persons other than Phoenix Finance Corporation, successor in interest to Phoenix Finance System, Inc., and inasmuch as the exceptions filed herein on behalf of Phoenix Finance Corporation are necessarily a duplication of exceptions which the complainants in the ordinary course would file, for the purpose of avoiding unnecessary duplication and burden upon the court the complainants adopt said exceptions of said Phoenix Finance Corporation" (F.R. 1721 at 1725, par. (c), same F.R. Sup. 3 at 7, par. (c)).

The exceptions to the Master's report were overruled (Court's decree, F.R. 202-204).

Phoenix filed motion to vacate and to set aside decree, findings of fact and opinion on the claimed ground of want of jurisdiction (F.R. 204-205), to which motion the Bridge Company filed a resistance (F.R. 206-208). Motion overruled (F.R. 208-211).

Phoenix filed a petition for rehearing, and in the alternative for modification of decree verified by its president John A. Thompson (F.R. 216-223 and F.R. 224-391).

Trustees on the same day filed a motion for dismissal and in alternative petition for rehearing, Division I claiming want of jurisdiction as claimed in Phoenix' prior motion, and asking dismissal; Division II, in the alternative

for rehearing, *adopting the petition for rehearing of Phoenix.* Trustees' motion was verified by Phoenix' president John A. Thompson (F.R. 211-214).

Said motions and petitions were overruled (F.R. 411-413).

Trustees and Phoenix appealed to the Eighth Circuit Court of Appeals and filed assignments of error (F.R. 501-528).

PHOENIX' ASSERTIONS ON PAGES 12-14 OF ITS BRIEF WITH RESPECT TO THE ISSUES IN THE FEDERAL CAUSE ARE INACCURATE, INCOMPLETE AND DO NOT CONFORM TO THE RECORD.

The bill of foreclosure alleged: "That all of said bonds were duly made and executed on behalf of the (Bridge) Company, * * * and that all of said bonds, together with interest coupons attached thereto evidencing interest thereon as aforesaid, have now been issued *for a good and valuable consideration* and are now outstanding in the hands of divers persons and corporations who are now the owners and holders thereof for value." (Emphasis supplied) (F.R. 6). The bill prayed that an account be taken of the amount due on the bonds for principal and interest or otherwise, and that the defendant company be decreed *to pay to complainants* the amount found to be due on such accounting, plus costs and expenditures in the proceedings, and that in default thereof the property be sold to satisfy the amount so found due; and prayed *for deficiency judgment*, the appointment of a receiver, and *for general equitable relief* (F.R. 10-11).

The answer of the Bridge Company denied the validity of the deed of trust; alleged that there was a good defense to all or part of the bonds; and prayed that the plaintiffs be required to make a complete showing as to the consideration received by the Bridge Company in each

and every instance for the delivery of the bonds (F.R. 62-68).

The petition of intervention alleged that John A. Thompson and his associates were in control of both of the Bridge Company and of the Phoenix Finance System, Inc. (petitioner's predecessor) (F.R. 74), and dominated and controlled as aforesaid, the Bridge Company, in the month of March 1931, was caused to execute a note and mortgage to Phoenix Finance System, Inc., (petitioner's predecessor) in the sum of $50,000 without consideration; that said mortgage was invalid and void (F.R. 78, par. 9). That the Bridge Company thus dominated, as a part of a fraudlent scheme, plan and conspiracy, was caused to issue $200,000 of bonds secured by mortgage deed of trust and to issue bonds for the aforesaid purported $50,000 loan and other claimed obligations (F.R. 78-80). That the bonds and mortgage deed of trust were fraudulent, without consideration, invalid and void. The petition prayed that the bill be dismissed and prayed for general equitable relief (F.R. 80-83; amendment F.R. 100-102).

Phoenix filed answer to the petition of intervention denying all the allegations thereof and alleging that it was the *owner and holder for value of a large amount of bonds of the Bridge Company* issued in accordance with the mortgage declared on in the bill of foreclosure (F.R. 91-92).

The trustees filed reply to the petition of intervention denying the allegations thereof, etc. (F.R. 102-103).

Phoenix on page 13 of its brief asserts that no pleading named it as a party and no relief was prayed against it.

Phoenix was already a party in the lawsuit by representation by the trustees, with all the pleadings applying. The statement that Phoenix Finance Corporation had succeeded Phoenix Finance System, Inc. was made in open court by complainants' counsel who were of Phoenix' selection, and the Court upon such succession appearing

properly ordered Phoenix to be made a party co-complainant, and thus upon being made a party the pleadings on file applied to it as fully as though the petition of intervention had been amended inserting its name in lieu of that of its predecessor. The Court found that Phoenix and its predecessor were one and the same thing (Court's finding 41, F.R. 202). Phoenix made no objection to being made a party; did not move for further pleading, but filed answer to petition of intervention. The prayer of the bill of complaint and of its answer was its prayer, and the prayer of the petition of intervention the prayer against complainants, trustees and Phoenix. The trial proceeded and it is too late to object that additional pleadings and amendments were not filed. Phoenix was bound without them.[3]

Phoenix on page 14 of its brief asserts that, "No evidence was offered on its behalf at hearings before the Master." That assertion is contrary to the record.

Thompson, president of Phoenix and of its predecessor, and president of the Bridge Company at the time of the transactions, was called as a witness by complainants and

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3 *Himes v. Smith* (6 C.C.A.) 270 Fed. 132, cert. den. 255 U. S. 576, 41 S. Ct. 448, 65 L. Ed. 792;
Davis v. Zirkle, 80 Ind. A. 396, 138 N. E. 266;
Crary v. Kurtz, 132 Iowa 105, 107, 105 N. W. 990;
Nome & Sinook v. Ames Merc. Co. (9 C.C.A.), 187 Fed. 928;
Bell v. Corbin, 146 Ind. 269, 36 N. E. 23.
See 34 C. J. Sec. 1410, p. 994.

Rule 15-b of the Rules of Civil Procedure provides:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the pleadings."

Also see Rule 12-h, Rules of Civil Procedure.

testified directly and in detail as to the claimed underlying considerations of the bonds.[4]

Phoenix' assertion on page 14 of its brief that the decree merely denied foreclosure is contrary to the record. The Court rendered an opinion and made findings of fact as to all of Phoenix' claims in the instant case, and rendered a general judgment.

The decree provides (F.R. 204): "That the bill of the *plaintiffs* be dismissed as to the plaintiff, Phoenix Finance Corporation, and the prayer of the bill denied, except insofar as the decree provides for the protection of the holders of said $15,000 in bonds"; held by parties other than Phoenix.

The entire bill was dismissed, except insofar as relief was provided for certain holders of bonds. It was dismissed as to both the trustees and Phoenix, as far as Phoenix was concerned, and that is a general judgment and constitutes *res judicata*.[5]

Phoenix on pages 15-16 of its brief asserts: "Thus the grant of the sole power to the trustees to foreclose is absolute, but at the same time, the right of action for the debt evidenced by the bonds is expressly reserved to the bond-

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[4] Direct examination, F.R. 538-542; cross examination, F.R. 542 to 545; cross examination on part of interveners, F.R. 545-556; recross examination, F.R. 560-561; further cross examination, F.R. 562-564; further cross examination on part of interveners, F.R. 633-637, F.R. 673-675; further direct examination of Mr. Thompson on part of complainants in rebuttal, F.R. 675-678; cross examination on part of interveners, F.R. bottom p. 678-685, F.R. 691-692.

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[5] In *Hickey v. Johnson* (8 C.C.A.), 9 Fed. (2) 498, at 501 it is stated:

> "A general judgment or decree of dismissal, without more, renders all the issues in the case *res adjudicata*, and constitutes a bar to any subsequent suit for the same cause of action. Hence, when a court dismisses a suit upon some ground which does not go to the merits of the cause of action, but leaves them open to consideration in another court, or at another time, or in another way, the decree of dismissal must expressly adjudge that it is rendered for the specific reason upon which it is based, or must expressly provide that it is made without prejudice." (Citing numerous cases)

holders and withheld from the trustees." That assertion is not sustained by the record.

THE TRUSTEES HAD BROAD POWERS OF REPRESENTATION, INCLUDING THE RIGHT TO RECOVER ANY DEBT FOUND DUE.

The bonds made reference to the mortgage indenture for description of the property mortgaged, "and the right of holders of said bonds in the respect of such security" (F.R. 775). The applicable provisions of the mortgage indenture are: The mortgage indenture made it the duty of the Bridge Company to pay taxes on the mortgaged property (F.R. 31); to pay the interest on the bonds and to pay the bonds as they matured (F.R. 29); to keep the property in thorough repair, etc. (F.R. 31).

In case of default in the payment of the principal of or any interest on any bond or bonds for sixty (60) days it was provided that the trustees "may" and upon the written request of the holders of twenty-five per cent of the bonds then in default, shall declare the principal of all bonds due and payable immediately (F. R. 35), and "shall proceed to protect and enforce their rights and the rights of the bondholders under this Indenture by a suit or suits in equity, or at law, * * * by * * * foreclosure hereunder, or for the enforcement of any other appropriate, legal or equitable remedy, as the Trustees * * * shall deem most effectual." (F.R. 38.)

It also provided: Art. V. Section 10. "The company covenants that (1) in case default shall be made in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture, and any such default shall continue for a period of sixty days, or (2) in case default shall be made in the payment of the principal of any such bond when the same shall become payable, whether by the regular maturity of said bond, or by

declaration as authorized by this indenture, or by sale as provided in Section 6 of this article, or otherwise, then upon demand of the trustees the company will pay to the trustees, for the benefit of the holders of the bonds and coupons hereby secured then outstanding, the whole amount due and payable on all such bonds and coupons then outstanding, for interest or principal or both, * * * *and in case the company shall fail to pay the same forthwith upon such demand, the trustees in their own names, and as trustees of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid.*

"The trustees shall be entitled to recover judgment as aforesaid, either before or after or during the pendency, of any proceeding for the enforcement of the lien of the indenture upon the trust property, and the right of the trustees to recover such judgment shall not be affected by any sale hereunder, or by the exercise of any other right, power or remedy for the enforcement of the provisions of this indenture, or for the foreclosure of the lien hereof; and in case of a sale of the mortgaged property, and of the application of the proceeds of such sale to the payment of the debt, the trustees in their own names and as trustees of an express trust, shall be entitled to enforce payment of and to receive the amount then remaining due and unpaid upon any and all bonds issued hereunder and then outstanding for the benefit of the holders thereof, and shall be entitled to recover judgment for any portion of the debt remaining unpaid, with interest * * * (F.R. 41-42). (Emphasis supplied.)

It is further provided: Art. V. Section 13. "No holder of any bond or coupon secured hereby shall have any right to institute any suit, action or proceeding in equity or law, for the foreclosure of this Indenture," except in case the trustees after notice and demand refuse to act. * * * "It being understood and intended that no one or more holders of bonds and coupons shall have any right

in any manner whatever by his or their action to affect, disturb or prejudice the lien of this Indenture or to enforce any right hereunder, except in the manner herein provided, and that all proceedings at law or in equity shall be instituted, had and maintained in the manner herein provided, and for the equal benefit of all holders of such outstanding bonds and coupons." (F.R. 43-44.)

It then contains the paragraph quoted in Phoenix' brief on page 16, but that is immaterial. Phoenix did not act under that paragraph and the suggestion that it might have is merely a hypothetical suggestion. The trustees and Phoenix based their bill of complaint on the broad powers of representation through counsel chosen and paid by Phoenix.

Phoenix' brief, pages 16-18, note 14, seeks to question its own notice and demand on the Bridge Company. On July 12, 1933 Phoenix wrote trustees to declare all bonds immediately due and payable (F.R. 789-791). On July 13, 1933 trustees sent notice to the Bridge Company declaring all bonds due (F.R. 791-793). On August 28, 1933 the bill of foreclosure was filed (F.R. 1) reciting due demand (F.R. 8-9, par. 12). Phoenix now says that the bill was filed 46 days after the demand instead of 60 days.

Answer was filed on September 25, 1933 (F.R. 62-68) and petition of intervention was filed on December 5, 1933 (F.R. 73-83). Neither questioned the sufficiency of the demand. The petition of intervention alleged that the bonds and mortgage were fraudulent, without consideration, invalid and void; that obviated and waived any question of the sufficiency of the demand. 1 Corpus Juris Secundum, Section 27, pages 1070-1071.

Phoenix is not in position to question its own demand and to collaterally attack the decree of the Court.

FEDERAL COURT'S FINDINGS.

With respect to the $50,000 mortgage the Court found:

"26. A stockholders' meeting of the Bridge Company was held March 10, 1931, which was controlled by the stock of Thompson & Company and John A. Thompson, 1310 shares and proxies held by Thompson 375 shares, a total of 1685 shares out of 2586 shares represented, at which meeting a board of directors was elected controlled by said Thompson. Following said stockholders' meeting, a directors' meeting was held attended only by Thompson directors, viz., V. W. O'Connor, John A. Thompson, A. C. Wilder and Oscar R. Thorson. At this meeting, there was passed a purported resolution providing for the issuance of a $50,000 mortgage to the Phoenix Finance System, Inc., on the properties of the Iowa-Wisconsin Bridge Company which resolution contained the false and fraudulent recital that funds received from sale of stock had been inadequate to properly finance the rapid completion of the bridge; whereas, the Bridge Company then had nothing to do with the sale of stock and it had delivered to J. W. Shaffer & Company $320,000 of its stock and $10,000 in cash for the completion of the bridge. That pursuant to such resolution a mortgage was executed to Phoenix Finance System, Inc., for $50,000 signed on behalf of the Bridge Company by A. B. Wilder, who was then also an officer and director of said mortgage company. That in truth and in fact no indebtedness of said Bridge Company to the Phoenix Finance System, Inc., existed and the Bridge Company received no consideration for the execution of said mortgage; that the same was and is wholly without consideration, fraudulent and void. At said time said Thompson caused entries to be made on the books of said Bridge Company purporting to show the receipt of $50,000 in cash, whereas, in truth and in fact, said amount and no part thereof was received by the Bridge Company." (F.R. 191-192).

With respect to the $9,000 item to Kramer & Hogg, the Court in its opinion with respect to the Master's Conclusion No. 5 stated:

"This conclusion of law is attacked in the defendant and interveners' eighth exception. I think that in so far as the language of the Master's conclusion includes the $9,000 of bonds held valid in the hands of the Phoenix Finance Corporation, and the $3,125 in bonds held valid in the hands of the Phoenix Finance Corporation, it is erroneous. What I have said with respect to the legal status of the Phoenix Finance Corporation as the successor of Phoenix Finance System, Inc., places it completely upon a level with its predecessor so far as equities are concerned. With full notice it has adopted everything its predecessor did, and with full notice that its predecessor had at the outset taken 140 shares of stock of the Bridge Company without paying any subscription price therefor and has not accounted for it." (F.R. 177-178.)

By its findings numbers 27, 28, 29, 30 and 41 the court found that as a result of various fraudulent transactions Phoenix had become indebted to the bridge company in amounts which aggregate $26,085.85, $14,000 thereof being for stock of the Bridge Company, which the Phoenix received and disposed of without payment therefor to the Bridge Company (F.R. 192-194, both inclusive; F.R. 202).

With respect to the $10,000 item to Industrial Contracting Company and the $11,262.71 item to McClintic-Marshall Company, asserted in the instant case the Court found:

"40. That on March 7, 1932, a meeting of the board of directors of the Bridge Company was held at which were present Emory H. English, John A. Thompson, M. K. Thompson, Oscar R. Thorson, H. T. Wagner and A. B. Wilder, all Thompson and Phoenix Finance System, Inc., controlled directors, at which a purported resolution was adopted for the delivery of $97,000 of Class A bonds of the Bridge Company to the Phoenix Finance System, Inc., for the purported $50,000 mortgage and interest thereon and for $10,000 to the Industrial Contracting Company, $9,000 to Kramer & Hogg and $11,262.71 to McClintic-Marshall Company, with interest on such items amounting to $83,811.29 and with discount on the bonds of $12,727.31, making a purported total of $96,538.58 and a purported balance of

$461.42 being charged to Phoenix Finance System, Inc., on the books of the Bridge Company, making a total of $97,000.

"The aforesaid $10,000 to the Industrial Contracting Company was neither due from nor paid by the Bridge Company as aforesaid and the Bridge Company did not owe the $11,262.71 to McClintic-Marshall Company. That said two items were items that had been fully covered and disposed of by the Bridge Company in its settlement with John W. Shaffer & Company and were items which Thompson & Company, subsidiary of Phoenix Finance System, Inc., had undertaken to pay. That as a part of the scheme, plan and conspiracy leading up to the issuance of said bonds here involved, the said Thompson paid the balance of $11,262.71 to McClintic-Marshall Company and as a form and pretense the said John A. Thompson, dominating and controlling the Bridge Company in its acts, in making payment thereof for the Phoenix Finance System, Inc., as aforesaid, attempted to carry out such transaction as though he was making payment thereof for the Bridge Company and caused false entries to be made on the books of the Bridge Company as though said approximate amount had been advanced by the Phoenix Finance System, Inc., to the Bridge Company and the item paid by the Bridge Company, when in fact the Bridge Company did not owe said item." (F.R. 201-202).

COURT'S DECREE.

"* * * That the mortgage and bonds in suit were fraudulently issued. That all bonds are without valid consideration, with the exception of the bonds aggregating $15,000, hereinafter specified. That the bill of the plaintiffs be dismissed as to the plaintiff, Phoenix Finance Corporation, and that the prayer of the bill be denied, except in so far as the Decree provides for the protection of the holders of said $15,000 in bonds." held by parties other than Phoenix. (F.R. 203-204.)

Complainant Phoenix filed petition for rehearing and modification of decree, reasserting the items in the instant case as underlying considerations for the bonds including

the pretended resolutions now asserted (F.R. 216-391, particularly F.R. 244-245). The petition prayed:

> "Wherefore, petitioner prays:
>
> "First. That a rehearing be granted herein, and that it be given leave to present the new evidence aforesaid.
>
> "Second. In case rehearing is denied, then as alternative relief that the decree be modified so as to withhold from adjudication the question of the validity of the $50,000.00 mortgage given by the Bridge Company to petitioner, reserving the right to petitioner to litigate said mortgage in another action, if it so desires.
>
> "Third. In case rehearing is denied, the decree be so modified as to reinvest in petitioner 517 shares of "A" stock surrendered in exchange for bonds.
>
> "Fourth. In case rehearing is denied, that the decree be modified so as to withhold from adjudication the right of petitioner to institute an action at law against the Bridge Company, if it so desires, for money had and received." (F.R. 223).

Complainant trustees filed motion for dismissal and in alternative petition for rehearing adopting in its entirety Phoenix' petition for rehearing and the prayer thereof. Said motion was verified by Phoenix' president Thompson (F.R. 211-214, particularly 214).

The Bridge Company and interveners filed answer to the petitions for rehearing, stating, among other things, that the alleged $50,000 mortgage to Phoenix was made and also released as a part of a fraudulent scheme, plan and conspiracy (F.R. 394-410, particularly 398). Said motion and petitions for rehearing were overruled (F.R. 411-413).

Trustees and Phoenix both appealed to the Eighth Circuit Court of Appeals and assigned all the rulings, opinions, findings, decree and orders of the trial court as error (F.R. 502-528; see particularly trustees' assignments 13, 20, 26, F.R. 505-507; Phoenix' assignments 11, 12, 13, 31, 37,

38, 45, 47, 61, 63, F.R. 510-511, 516-517, 519-520, 523-524, 524-525, 527).

ARGUMENT.

SUMMARY OF ARGUMENT.

Phoenix' entire argument is based on the fallacious assumption that there is a question of jurisdiction involved. No such question is involved. Phoenix was the party to the federal cause. Phoenix was fully represented in the proceeding by the trustees. Phoenix was also an ancillary party to the proceedings. Phoenix present contentions were asserted in the federal cause and again asserted in the Supreme Court of the State of Delaware and adjudicated adversely to it, and certiorari was denied by this Court in both instances.

The question of consideration was directly in issue; the trustees had full authority to litigate the question and they litigated it under the direction of Phoenix. Phoenix is bound by the adjudications. The decision in the case of *Mackay v. Randolph Coal Company* was in effect overruled by the same Court that rendered it.

Successful defense to an action on collateral bars an action on the debt. A party cannot seek a foreclosure of a mortgage in one action and in a subsequent action ask for personal judgment against the defendant.

The Federal Court held, found and decreed that Phoenix was not entitled to recover the $9,000 item.

ARGUMENT.

Phoenix' entire argument is based on the fallacious assumption that there is a question of jurisdiction involved. Such question was disposed of by the Eighth Circuit Court of Appeals (F.R. 1693-1694; 98 Fed. (2) 416, 420-421), and

by this Court's denial of certiorari 305 U. S. 650; rehearing denied 305 U. S. 676.

RESPONSE TO POINTS I AND II OF PHOENIX' BRIEF PAGES 22-29.

PHOENIX WAS THE PARTY TO THE FEDERAL CAUSE AND IS BOUND BY THE FINDINGS, DECREE AND ORDERS THEREIN; (a) PHOENIX WAS FULLY REPRESENTED IN THAT PROCEEDING BY THE TRUSTEES; (b) PHOENIX WAS ALSO AN ANCILLARY PARTY TO THE PROCEEDINGS.

Phoenix directly designated the trustees as its representatives and agents to litigate the matter. It instigated the federal action and that was carried on at the expense of and under its direction by attorneys of its own selection. Phoenix had the trustees adopt its exceptions to the Master's report and had them adopt Phoenix' petition for rehearing and modification of decree, and both Phoenix and the trustees appealed.

In *Souffront v. LaCompagnie Des Sucreries De Porto Rico*, 217 U. S. 475, 30 Sup. Ct. 608, at 612 the Court said:

> "The persons for whose benefit, to the knowledge of the court and of all the parties to the record, litigation is being conducted, cannot, in a legal sense, be said to be strangers to the cause. The case is within the principle that one who prosecutes or defends a suit in the name of another, to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly, to the knowledge of the opposing party, is as much bound by the judgment, and as fully entitled to avail himself of it, as an estoppel against an adversary party, as he would be if he had been a party to the record. *Lovejoy v. Murray*, 3 Wall. 1, 18 L. ed. 129."

Also see:

Robbins v. City of Chicago, 4 Wall. 657, 71 U. S. 657, 672, 18 L. Ed. 427;

Hoskins v. Hotel Randolph Co., 203 Iowa 1152, 211 N. W. 423, 65 A.L.R. 1125;

Fulsom v. Quaker Oil & Gas Co., (8 C.C.A.) 35 Fed. (2d) 84, 90;

Plumb v. Crane, Admr. etc., 123 U. S. 560;

Stoddard v. Thompson, et al., 31 Iowa 80.

The Eighth Circuit Court of Appeals held that the Court had jurisdiction to decide every issue including the amount of the debt (F.R. 1694, 98 F. (2nd) 416, 421).

Phoenix was also an ancillary party to the proceeding; it was given notice of the proceedings before the Master; it took part in the trial by counsel for trustees of its selection and by its counsel W. B. Sloan; filed exceptions to the Master's report and took part in every step of the proceedings.

Phoenix in the federal case contended, as in the instant case, that the federal cause involved two separate suits, one brought by the trustees to foreclose a deed of trust, and one brought by the Bridge Company and interveners to cancel the bonds held by Phoenix. With respect to that contention the Eighth Circuit Court of Appeals said: (R. 1794, 98 Fed. (2nd) 421)

> "Appellants contend that the proceeding below was a consolidation of two separate and distinct suits, one brought by the trustees to foreclose the trust deed and one brought by the bridge company and interveners to cancel the bonds held by Phoenix; and that jurisdiction as to each controversy must be determined separately. This contention is without merit. * * * Further, if the controversy between the two Delaware corporations should in any way be considered as a separate controversy involving only the validity of certain of the bonds, then it was ancillary to the foreclosure proceeding, and jurisdiction attached irrespec-

tive of citizenship, because the subject matter had been drawn into the federal court under the receivership before Phoenix became a party. *Morgan's Louisiana & T. R. & S. S. Co. v. Texas Central Ry. Co.*, 137 U. S. 171, 201, 11 S. Ct. 61, 34 L. Ed. 625; *Krippendorf v. Hyde*, 110 U. S. 276, 4 S. Ct. 27, 28 L. Ed. 145. The court did not err in overruling appellants' attack on the jurisdiction."

Certiorari denied 305 U. S. 650; rehearing denied 305 U. S. 676.

The same contentions asserted by Phoenix in the instant case were asserted by it in the Supreme Court of Delaware and the same federal record was before that Court.

In *Iowa-Wisconsin Bridge Company, defendant below, plaintiff in error, v. Phoenix Finance Corporation, plaintiff below, defendant in error*, the Court said: (F. 191-192, 25 Atl. (2) 383, at 390)

"The trustees, and, it must be said, Phoenix as well, based their bill of complaint on the theory of a broad power of representation; for they, through counsel chosen and paid by Phoenix, challenged inquiry into the consideration received by the Bridge Company for the issuance of the bonds, and prayed that an account be taken of the amount due on them. Both the defendant's answer and the petition of intervention, taken as such, accepted the challenge by denying the existence of a valid consideration. The issue was sharply and precisely drawn by the pleadings; and there was no effort made by the complainants to reframe their bill, or to have stricken from the answers, as being immaterial or irrelevant, the allegations that the bonds had been issued without valid consideration. Phoenix, likewise, kept silent; and the issues as forced by the complainants in their representative capacity and with, at the least, the tacit approval and consent of Phoenix, embraced both the validity of the mortgage as a lien on the property of the Bridge Company and the pre-existence of a debt or obligation in support of the bonds for the security of which the mortgage was given. The latter issue evoked a mass of testimony; and on the issue, Thompson, president of Phoenix and of its predecessor, and president as well of the Bridge Com-

pany testified directly and in detail. Full opportunity was afforded the bondholders to show that the Bridge Company had received a fair consideration for the bonds. If the results of the proceeding were disappointing to Phoenix the cause must be attributed to the stubborn facts of the case, and not to any want of time or season for the development of the truth. See 115 F. 2d 1, at pages 6, 7."

RESPONSE TO POINTS III AND IV OF PHOENIX' BRIEF PAGES 29-36.

THE QUESTION OF CONSIDERATIONS WAS IN ISSUE. THE TRUSTEES HAD FULL AUTHORITY TO LITIGATE THE QUESTION OF CONSIDERATIONS AND THE EXISTENCE OF DEBT AND LITIGATED THEM UNDER THE DIRECTION OF PHOENIX. PHOENIX WAS ALSO AN ANCILLARY PARTY. PHOENIX IS BOUND BY THE ADJUDICATIONS.

The question of lack of considerations for the bonds was directly involved in the suit. Every question relating not only to the fraud but to the considerations was fully tried and fully determined by the court. The claimed underlying considerations of the note and mortgage and other items involved in the instant case, and the note and mortgage themselves and other items were all put forward as claimed considerations for the bonds and were fully investigated to the minutest detail and determined.[6]

As said in *Jones on Mortgages*, 8th Ed., Sec. 316 at page 289:

> "A debt, either pre-existing or created at the time, or contracted to be created, is an essential requisite of a mortgage. 'A mortgage is, in equity, a hypothecation or pledge of property for the security of a debt.

[6] Phoenix' exception 5, F.R. 1744-1747 same F.R. Sup. 26-29; Mortgage Exhibit B-25 H.E.B., F.R. 823-825; Off. F.R. 611-612, F.R. 578-580, F.R. 551-552; Court's opinion, findings of fact and final decree, F.R. 156-204, and particularly opinion F.R. 172-173.

> There must be a debt, or there can be no security for its payment.' Hence it is said, if there is no debt, there can be no mortgage. Debt, in this connection, means a duty or obligation to pay, for the enforcement of which an action will lie."

And in *Carpenter v. Longan*, 16 Wall. 271, 21 L. Ed. 313, it is stated:

> "Upon bill of foreclosure * * * an account must be taken to ascertain the amount due upon the instrument secured by the mortgage. * * * The note and mortgage are inseparable; the former as essential, the latter as an incident. * * * The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents."

See also:

Ariz. Copper Estate v. Watts, 237 F. 385;

Holladay v. Willis, 101 Va. 274, 43 S. E. 616;

Saunders v. Dunn, 175 Mass. 164, 55 N. E. 893;

49 C. J., page 903, Sec. 23;

Chapman v. Sipe Springs First Nat. Bank, 275 S. W. 498 (Tex.);

Stokes v. Stokes, 155 N. Y. 581, 50 N. E. 342.

Phoenix cites and quotes from *Mackay v. Randolph Macon Coal Company* (8 C.C.A.), 178 Fed. 881. That case involved a question of merger not of *res judicata* and was decided under earlier equity rules and was in effect overruled by the same court that rendered it.

In *Lane v. Equitable Trust Company of N. Y.* (8 C.C.A.), 262 Fed. 918, certiorari denied 252 U. S. 578. The Court said with respect to the *Mackay* case at page 922:

> "It was not held in that case that the deficiency judgment was invalid. It was held that the doctrine of merger did not apply. It is true that language was used in that opinion which went beyond the point in-

volved in the case, as stated in the opinion, but 'the language of the opinion cannot be separated from the facts of the case.'"

In the *Lane Case* which involved the foreclosure of a trust deed in the case of *Equitable Trust Company of N. Y. v. Wabash R. R. Co., et al.*, wherein the trust deed as quoted at page 924 of the opinion contained in substance and effect the same provisions contained in the trust deed in the instant case, Article 5, Section 10 (F.R. 41-42, quoted *supra* this brief).

The Court said at page 925:

> "It thus appears that a deficiency judgment was expressly provided for in the deed of trust, that in the decree the special master was expressly directed to report the amount of the deficiency, if there should be one, and that the trustee should be entitled to have judgment for the amount of such deficiency. We think that rule 10 authorized a deficiency judgment in this case."

It should be kept in mind that it is the Eighth Circuit Court of Appeals that rendered the decisions in this case, 98 Fed. (2) 416 and 115 Fed. (2) 1, and if the *Mackay* case had had any application to the facts in this case it would have been mentioned by the Eighth Circuit Court of Appeals.

In the case of *Fidelity-Philadelphia T. Company v. Hale & Kilburn Corp.* (Sept. 16, 1937), 24 Fed. Supp. 3 at 11, the court said:

> "On May 4, 1925, the rule was amended, 28 U.S.C.A. following Section 723 (268 U. S. 709), so that now it reads as follows: 'In suits for the foreclosure of mortgages or for the enforcement of other liens a decree may be rendered for any balance found to be due over and above the proceeds of the sale or sales; and execution may issue for the collection of the same as is provided in rule 8 when the decree is solely for the payment of money. Such a deficiency decree may be so rendered and enforced whether the plaintiff owns the

debt or is a trustee or agent for another or others who own it, as often is true when the debt is evidenced by notes or bonds. Where the plaintiff is such trustee or agent, any money collected on the execution shall be paid to him as such representative, and he shall pay it to the owner of the debt if there be only one, and if there be more shall distribute it pro rata among them according to their respective interests.'

"It will be noted that the amendment of May 4, 1925, which is the rule now in force, besides expressly giving a trustee, who does not actually own the debt, the right to recover a deficiency judgment, omitted the words, 'to the plaintiff' from the clause 'any balance that may be found to the plaintiff.' How important this omission is can be seen from the majority and dissenting opinions in *Lane v. Equitable Trust Co.*, 8 Cir., 262 F. 918, 922.

"It is beyond question that the Amendment of 1925 to Rule 10 gives a trustee for bondholders under a corporate mortgage a standing in court as a party to recover a deficiency judgment in a foreclosure proceeding without regard to whether or not he is vested with the ownership of the debt, right to sue or chose in action. The rule does not change substantive rights. It does not affect what was said in *Continental-Equitable Title & Trust Co., supra,* to the effect that actual ownership of the debt does not vest in the trustee until demand. It is procedural, and merely makes an agent a proper party to recover a judgment, not for himself as owner of the debt, but for his principals. The rights of the real owners of the debt are guarded by the last sentence of the rule. Moreover, prior to the Amendment of 1925, the question had been raised in *Mackay v. Randolph Coal Co., supra,* whether the parties by agreement could give to a third party (the trustee) the right to sue to recover a debt without actual ownership of the debt. It seems more than likely that the Amendment of 1925 was promulgated to meet the difficulties which the extremely technical position adopted by the courts in the cases referred to had thrown in the way of corporate foreclosures for the benefit of bondholders. At any rate, those decisions, in view of the changed equity rule are no longer controlling. I therefore conclude that failure to make a

demand does not bar the right of the trustee to deficiency decrees in this suit."

Code of Iowa 1935, Section 10968:

"PLAINTIFF AS LEGAL REPRESENTATIVE. An executor or administrator, a guardian, a trustee of an express trust, a party with whom or in whose name a contract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name, without joining with him the party for whose benefit the action is prosecuted."

In the leading case of *Kerrison v. Stewart*, 93 U. S. 155, 25 L. Ed. 843, this Court said:

"Under some circumstances, a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as by what is done by him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust, * * *; or to one by a stranger against him to defeat it in whole or in part. * * *. In such cases, the trustee is in court for and on behalf of the beneficiaries; and they, though not parties, *are bound by the judgment*, unless it is impeached for fraud or collusion between him and the adverse party.

"The principle which underlies this rule has always been applied in proceedings relating to railway mortgages, where a trustee holds the security for the benefit of bond holders. It is not, as seems to be supposed by the counsel for the appellants, a new principle developed by the necessities of that class of cases, but an old one, long in use under analogous circumstances, and found to be well adapted to the protection of the rights of those interested in such securities, without subjecting litigants to unnecessary inconvenience.

"Undoubtedly, cases may arise in which it would be proper to have before the court the beneficiaries themselves, or some one other than the trustee to represent their interests. *They then become proper parties, and may be brought in or not, as the court in the exercise of its judicial discretion may determine.* But this was very clearly not a case in which such action was required, and so all the parties evidently thought, while the litigation was progressing. * * *

"If the creditors, mindful of their interests, are dissatisfied with the manner in which he represents them in suits that are pending, they may, under proper circumstances, intervene and ask to be made parties, so as to speak for themselves; but their adversary need not go after them, except under the direction of the court."

The same contentions now made by Phoenix were made by Phoenix in a prior petition for writ of certiorari and determined by this Court:

In *Iowa-Wisconsin Bridge Company, defendant below, plaintiff in error, v. Phoenix Finance Corporation, plaintiff below, defendant in error,* the Supreme Court of Delaware, speaking through Chief Justice Layton, said: (R. 191, lines 3 to 31, R. 192, lines 1 and 2, 25 Atl. (2) 383, at 389-390.)

"Here, the bonds expressly referred to the indenture for a statement of the rights of the bondholders. The bondholders themselves were expressly denied the right to sue for their own protection except in certain defined circumstances. On the other hand, the trustees, upon defaults declared, and upon the request of holders of bonds in the specified amount, were required to proceed to protect and enforce the rights of the bondholders by foreclosure of the mortgage, or for the enforcement of any other appropriate legal or equitable remedy, as might be deemed most effectual. These provisions are broad and comprehensive. *Mercantile Trust Co. v. Schlafly, supra.* They were an essential part of the bonds. *Continental-Equitable Title & Trust Co. v. National Properties Co.*, 273 F. 967; *Central National Bank v. Bateman & Companies, Inc.*, 15

Del. Ch. 31, 131 A. 202. Clearly it was to the advantage of the bondholders to have adjudicated both the validity of the mortgage as a lien on the property and the legal sufficiency of the bonds. See *Speers Sand & Clay Works, Inc. v. American Trust Co.*, 20 F. 2d 333. If both of the objects plainly of benefit to the bondholders could be accomplished under proper pleadings in the foreclosure proceeding, all the rights of the bondholders would be settled. Moreover, a deficiency judgment was prayed for, which, in itself, would seem to require inquiry into the existence and amount of the underlying debt. In these circumstances, it would be difficult, we think, successfully to maintain that the power of representation conferred on the trustees was so narrow as to exclude from inquiry and determination the existence and extent of the consideration underlying the bonds. Essential privity between the trustees and their beneficiaries was not wanting. See *McPherson v. Commercial Building & Securities Co.*, 206 Iowa, 562, 218 N. W. 306."

Certiorari denied October 26, 1942, 317 U. S. 671.

Also see:

Beals v. Illinois & R. R. Co., 133 U. S. 290, 10 S. Ct. 314, 33 L. Ed. 608;

Elwell v. Fosdick, 134 U. S. 500, 10 S. Ct. 598, 33 L. Ed. 998;

Richter v. Jerome, 123 U. S. 233, 8 S. Ct. 106, 31 L. Ed. 132;

Shaw v. Little Rock & Fort Smith R. R. Co., 100 U. S. 605, 25 L. Ed. 757;

Mercantile Trust Co. v. Schlafly, 299 F. 202;

Kent v. Lake Superior Ship Canal, Ry. & Iron Co., 144 U. S. 75, 12 S. Ct. 650, 36 L. Ed. 352;

In re *Franklin Brewing Co.*, 254 F. 910;

7 *Fletcher Cyc. Corp.*, Sec. 3262, 3265.

SUCCESSFUL DEFENSE TO ACTION ON COLLATERAL BARS AN ACTION ON THE DEBT.

Want of consideration of the particular note and mortgage and items herein involved as a consideration for bonds was directly in issue in the foreclosure case. There was but one cause of action as far as the note and mortgage and other items were concerned and that was the cause of action based on the claimed debts evidenced by and underlying the note and mortgage and other items. It was on the basis of these claimed debts that recovery was sought on the bonds and the Federal Court has adjudicated that such debts do not exist. And it is now on these same claimed debts that the present action is based.

The rule is stated as follows in 34 C. J. page 853:

> "A successful defense on the merits in an action either on the principal debt or the collateral will bar an action on the other."

In support of this are cited among other cases, *Johnson v. Forstall, et al.*, 3 La. Ann. 466, and *Sykes v. Gerber*, 98 Penn. Stat. 179.

In the last cited case there has been a suit on a promissory note, with judgment for defendant. An action was then commenced on the original debt. The Court said:

> "The original claim and the note were by the same parties, for the same consideration and payment of either would have satisfied both. A judgment in favor of the creditor upon either would be a bar to a recovery on the other. And a judgment for the debtor in an action which finally disposed of the note for equally good reason is a complete defense against a suit upon the account or claim which the note represented."

In *Chew v. Brumagen*, 13 Wall. 497, 20 L. Ed. 663, this Court said:

"They were represented by the trustee, and the judgment which he recovered settled finally against them, and all claiming under them, as well as against Wood (the trustee) the amount recoverable."

Also see:

Beloit v. Morgan, 7 Wall. 619, 19 L. Ed. 205;

Thompson v. Roberts Bros., 65 U. S., 24 How. 233, 4 Mill. Dec. 94, 16 L. Ed. 648.

In *Kenyon v. Wilson, The Same v. Baker*, 78 Iowa 408, the Court said:

"An adjudication is final and conclusive of all matters in a case which the parties could have presented to the court for adjudication in the case. The law hates a multiplicity of suits, and will not permit a plaintiff to split up his demands, presenting one at a time, in separate successive actions. He must litigate all matters growing out of his causes of action upon which a remedy may be sought in one action. *Thus he cannot seek a foreclosure of a mortgage in one action, and in a subsequent action ask for a personal judgment against the defendant. He could have recovered both remedies in the first action, and must be content with what he first recovers.*" (Emphasis supplied.)

Also see:

Iowa-Wisconsin Bridge Company, defendant below, plaintiff in error, v. Phoenix Finance Corporation, plaintiff below, defendant in error, (R. 178-196) 25 Atl. (2) 383.

Phoenix, on page 36 of its brief, asserts that it was agreed that the $50,000 mortgage should be reinstated. Agreed by who?

The pretended resolutions upon which Phoenix bases the assertion were offered in evidence in the Federal cause; they were passed as a part of a fraudulent conspiracy while Thompson-Phoenix dominated and controlled the Bridge Company. The court found the purported resolutions to

be fraudulent, a part of the acts of a fraudulent conspiracy, and that the mortgage was executed as a part of the conspiracy and that it was wholly without consideration, fraudulent and void. Phoenix cannot revive what the Court has condemned and held fraudulent and void.

RESPONSE TO POINT V OF PHOENIX' BRIEF PAGES 36-39.

THE COURT HELD, FOUND AND DECREED THAT PHOENIX WAS NOT ENTITLED TO RECOVER THE $9,000 ITEM.

Phoenix' assertion that the $9,000 Kramer & Hogg item was a part of the underlying considerations for the $50,000 mortgage, and that there was no finding with respect to it is contrary to the record. The $9,000 item was asserted in the trial as an alleged additional consideration for the $97,000 of bonds (see Phoenix' exception 5, F.R. 1745 same F.R. Sup. 27). The mortgage having its inception in fraud was a dead instrument from the day of its execution and was so found by the court and Phoenix cannot now infuse it with life.

Thompson, president of Phoenix, was also president of the Bridge Company and he and other directors were also directors of the Bridge Company controlling and dominating the Bridge Company (Findings 19, 20, 26 and 40, F.R. 188, 191-192, and 201-202), and at the time of the alleged $9,000 payment to Kramer & Hogg, and at the time of the delivery of the bonds, they were in duty bound merely to credit any payment claimed to have been made by Phoenix to or for the Bridge Company on the amounts due the Bridge Company from Phoenix.

This Court has said:

"The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged *the burden is upon those who would maintain them to show their entire fairness and where a sale is involved the full adequacy of the consideration. Especially is this true where a common director is dominating in influence or in character.* This court has been consistently emphatic in the application of this rule, which, it has declared, is founded in soundest morality, and we now add in the soundest business policy." (Emphasis supplied.)

Geddes et al. v. Anaconda Copper Mining Co., 254 U. S. 590.

Such transactions are presumptively fraudulent.

Thompson and his controlled Phoenix, dominating and controlling the Bridge Company, owed a fiduciary duty to the Bridge Company, in the performance of which the law forbade them to take bonds for any payments claimed to have been made by Phoenix to the Bridge Company or for it while Phoenix was indebted to the Bridge Company in a far greater amount, and having acted in a dual capacity the note, mortgage and bonds were presumptively fraudulent.

In Vol. 3, *Thompson on Corp.*, pages 217, 218, Section 2289, it is said:

"But the rule is also well settled that where, under proper pleadings, fraud or illegality in the issue or sale of such bonds or coupons has been shown, then the holder or indorsee, before he is entitled to recover, must prove that he is a holder for value; *and the mere possession of the paper* under such circumstances is *not sufficient.* The reason of this rule is that the proof that the instrument was unlawful or fraudulently issued overcomes the presumption of the *good faith* on the part of the holder, and then casts upon him the *burden* of proving that he was a purchaser for value

before maturity and without notice of any defense * * *."

Full inquiry and examination was made by the court as to the claimed underlying considerations of the note and mortgage, said $9,000 item, other items and the bonds in question. All the evidence bearing thereon was presented and analyzed in detail and from it the Court found that there in fact was no consideration for the note and mortgage, nor for the $9,000 Kramer & Hogg item, nor for the other items, nor for the bonds; that Phoenix in fact at the time of the payment claimed as a consideration for said $9,000 item was indebted to the Bridge Company in a far greater amount; that in law any payments made by Phoenix were merely a partial payment of its indebtedness to the Bridge Company and that no consideration existed for the above items.

The Court in its opinion said:

> "This conclusion of law is attacked in the defendant and interveners' eighth exception. I think that in so far as the language of the Master's conclusion includes the $9,000 of bonds held valid in the hands of the Phoenix Finance Corporation, and the $3,125 in bonds held valid in the hands of the Phoenix Finance Corporation, it is erroneous. What I have said with respect to the legal status of the Phoenix Finance Corporation as the successor of Phoenix Finance System, Inc., places it completely upon a level with its predecessor so far as equities are concerned. With full notice it has adopted everything its predecessor did, and with full notice that its predecessor had at the outset taken 140 shares of stock of the Bridge Company without paying any subscription price therefor and has not accounted for it." (F.R. 177-178.)

The court found that as a result of various fraudulent transactions Phoenix had become indebted to the Bridge Company in amounts which aggregated $26,085.85, $14,000 of which represented the value of 140 shares of the Bridge Company's stock which Phoenix had received and disposed

of without payment therefor to the Bridge Company (Court's findings 27, 28, 29 and 30, F.R. 192-194). The Court, accordingly, disallowed the items of $9,000 and $3,-125.

The Court in its decree sustained said exception eight. The decree states:

> "The defendant and interveners' exceptions numbered eight, nine and eleven are sustained, with exceptions reserved to all opposing parties."

The decree further provided: * * *

> "That the mortgage and bonds in suit were fraudulently issued. That all bonds are without valid consideration, with the exception of the bonds aggregating $15,000, hereinafter specified. That the bill of the plaintiffs be dismissed as to the plaintiff, Phoenix Finance Corporation, and that the prayer of the bill be denied, except in so far as the Decree provides for the protection of the holders of said $15,000 in bonds" held by parties other than Phoenix (F.R. 203-204).

Both trustees and Phoenix, complainants, on appeal assigned as error the Court's decision as to said $9,000 item. Trustee's assignments: (F.R. 505)

"12.

"(b) The court erred in concluding that the Master in his Conclusion of Law No. 5 erred in holding that the $9,000 of bonds and the $3,125 of bonds in the hands of Phoenix Finance Corporation were valid; and erred in failing and refusing to sustain the validity of bonds to the extent of the two amounts aforesaid in the hands of Phoenix Finance Corporation."

"(d) The court erred in concluding in effect, that the $9,000 and $3,125 of bonds held by Phoenix Finance Corporation were tainted with fraud and were illegal."

Phoenix' assignments: (F.R. 510-511)

"11.

"(c) And the court erred in its modification of the Master's Finding No. 8 by disallowing even the $9,000 of bonds delivered on account of the payment of that amount to Kramer & Hogg."

"12.

"(b) And the court erred in its modification of the Master's Finding No. 9 by disallowing even the bonds issued for the $9,000 paid to Kramer & Hogg and in adjudicating said bonds illegal."

"13.

"The court erred in refusing to adopt the finding of the Master in Finding No. 10-A that the Bridge Company received full consideration for the $9,000 of bonds issued to Kremer & Hogg, in settlement of a mechanic's lien claim, and erred in holding that said bonds were invalid."

Errors Based on the Opinion: (F.R. 524-525)

"47.

"(b) The court erred in concluding that the Master in his Conclusion of Law No. 5 erred in holding that the $9,000 of bonds and the $3,125 of bonds in the hands of Phoenix Finance Corporation were valid; and erred in failing and refusing to sustain the validity of bonds to the extent of the two amounts aforesaid in the hands of Phoenix Finance Corporation."

"(d) The court erred in concluding, in effect, that the $9,000 and $3,125 of bonds held by Phoenix Finance Corporation were tainted with fraud and were illegal."

The Eighth Circuit Court of Appeals in its opinion said: (F.R. 1704, 1709, 98 Fed. (2) 425-426, 429.)

"The Master found that the bridge company received full consideration for the $9000 paid by Phoenix to

Kramer & Hogg for the release of a mechanic's lien, and no consideration for the alleged payment of $461.42. The court disallowed both items, the latter as not established by the evidence and the first on the ground that the plaintiffs were not entitled to any affirmative relief. The court found several items of value chargeable to Phoenix on the ground of fraud which much more than off-set the two items, if valid. Some of these findings abundantly supported by the evidence will be noted. * * * All of these findings, supported as they are by evidence, justified the court in holding that Phoenix is not entitled to credit for the $9,000 and $461.42 items. * * * *

"* * * The Master disallowed all but $3,125 which was used to pay taxes. This is a just claim, but is more than off-set by the $14,000 and other items referred to above. * * *

"For the foregoing reasons the decree of the district court is affirmed."

Phoenix asserts that it was necessary that there be a pleading of counterclaim or set-off. The question of considerations was directly in issue. Furthermore, Phoenix' present contention is merely a collateral attack on the judgment. A judgment cannot be impeached collaterally on account of any defect in the pleadings. Such matter can only be claimed on direct appeal from the judgment and on assignment of error.

34 *C. J.*, pages 555, 560, 561, Sections 856, 860, 861;

Jarrell v. Cole, 215 F. 315, 131 C.C.A. 589;

Mengel v. Mengel, 145 Ia. 737;

Manson v. Duncanson, 166 U. S. 547, 17 S. Ct. 647;

Cooper v. Reynolds, 10 Wall. 308, 316, 77 U. S. 308.

Complainants, trustees and Phoenix, on appeal assigned as error "that the decree is beyond the scope of the pleadings and parties and of the proper evidence under the pleadings" (Trustees' assignment 23, F.R. 507; Phoenix' as-

signment 59, F.R. 526-527). The assignments of error were overruled by the Circuit Court of Appeals' affirmance of the case (F.R. 1695, 1709, 98 Fed. (2) 421, 429).

Phoenix litigated the question of consideration and the Court had jurisdiction of the subject matter and of the parties, and any claimed error in the decision could only be reviewed on appeal and decision is final even if it were erroneous.

Thornton v. Carter, (8 C.C.A.), 109 F. (2) 316, 320.

The petition of intervention was sufficient and the items have been fully litigated.

In 57 *C. J.*, page 389, Sec. 40 it is stated:

> "Although the matter could not be interposed as a set-off because no action could be maintained thereon it may still be available by way of defense."

In 49 *C. J.*, page 310, Sec. 380 it is stated:

> "Where matter relied upon is strictly a defense in whole or in part to plaintiff's cause of action, it need not be set up as a cross demand."

A court of equity, or a court possessing equitable jurisdiction, has inherent power as a part of its general jurisdiction, to allow or compel a set-off independent of statute. 57 *C. J.* 361; *Scott v. Armstrong,* 146 U. S. 499, 13 S. Ct. 148, 36 L. Ed. 1059. The right to set-off formerly regarded as attaching to the remedy only and not to the debt itself, is now recognized, particularly by the federal courts, as a matter of substantive justice affecting substantive relations between the parties. *The Gloria,* 286 Fed. 188, 192; Questions of C.C.A., answered 266 U. S. 328, 45 S. Ct. 112, 69 L. Ed. 313.

In the federal courts set-off is not confined to matters arising out of the contract or transaction sued on. *Central Appalachian Co. v. Buchanan* (C.C.A. 6th), 90 Fed. 454, (opinion by Judge Lurton, concurred in by Judge Taft).

CONCLUSION.

The questions presented by the petition have been previously presented to this Court:

1. First Trust and Savings Bank (formerly Bechtel Trust Company) and A. H. Schubert, Trustees, and Phoenix Finance Corporation, Complainants, v. Iowa-Wisconsin Bridge Company, Defendant, Fayette D. Kendrick, et al., Interveners, 98 Fed. (2) 416; entitled in this Court, Phoenix Finance Corporation, petitioner, v. Iowa-Wisconsin Bridge Company, et al., No. 438, October Term, 1938; certiorari denied 305 U. S. 650; rehearing denied 305 U. S. 676.

2. Iowa-Wisconsin Bridge Company, Defendant Below, Plaintiff in Error, v. Phoenix Finance Corporation, Plaintiff Below, Defendant in Error, (Del.) 25 Atl. (2) 383; No. 403, October Term, 1942, this Court; certiorari denied October 26, 1942, 317 U. S. 671.

The questions presented by the petition have been determined by this Court in its prior decisions, and the petition presents no new question of general importance.

We respectfully submit Phoenix' petition for writ of certiorari should be denied.

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